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S. HRG. 109–898

EXAMINING ENFORCEMENT OF CRIMINAL INSIDER TRADING AND HEDGE FUND ACTIVITY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

TUESDAY, DECEMBER 5, 2006

Serial No. J–109–121

Printed for the use of the Committee on the Judiciary

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EXAMINING ENFORCEMENT OF CRIMINAL INSIDER TRADING AND HEDGE FUND ACTIVITY

TUESDAY, DECEMBER 5, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:32 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter and Grassley.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed with this hearing on enforcement of insider trading and the issue of hedge funds, where we now find enormous growth, to more than $1 trillion a year, some 30 percent of the U.S. stock transactions.

Sarbanes-Oxley had included in it provisions for criminal law enforcement which came out of hearings from the Judiciary Committee, and this is the third in a series of hearings by the Judiciary Committee into this very important subject.

We have circulated draft legislation which will be the subject of comment here today. A concern about Federal court decisions prohibiting coordination between the Securities and Exchange Commission and the Department of Justice invalidating two criminal prosecutions. A question arises as to why that should be. What is the problem with having the SEC and the Department of Justice coordinate?

We find that the whistleblower provisions of existing law have not been utilized by the Securities and Exchange Commission, and the draft legislation has a proposal to make awards at the discretion of the Attorney General in substantial amounts to whistleblowers who have proceeds going to the Federal Government by way of fine or settlement or other enforcement mechanisms.

And with the development of the hedge funds so that there are many who are now investing, the so-called smaller investors, the issue arises as to whether there ought to be regulation. That is really essentially a matter for the Banking Committee, and I have talked to Senator Shelby, the Chairman, about that.

The Judiciary Committee is making an inquiry, as is the Finance Committee, led by Chairman Senator Grassley, who is also a mem-

ber of this Committee. And the draft legislation has a provision which would call for regulation where there are pension funds involved. Those are subjects which we are going to be considering in the course of today's hearing.

The issue of the investigation into charges brought by Mr. Gary Aguirre has attracted the attention of the Committee. There are a number of factors which raise issues. We have had the unusual result of Mr. Aguirre being involved in a very important SEC investigation and having favorable evaluations of his job and two pay raises, and then when he presses an investigation to have suddenly a re-evaluation as to what he has been doing and to have him terminated.

We have another investigator in the SEC expressing concerns about the nature of the investigation, what has been happened, and submits an e-mail after being asked to be relieved of his responsibilities that there is something smelly going on.

Then you have no action taken by the SEC until the Senate investigation is initiated. You have the deposition taken of Mr. Mack long after it might have been taken in the ordinary course of business, and, curiously, 5 days after the statute of limitations has run.

You have the Inspector General of the SEC closing out an investigation without interviewing Mr. Aguirre. A little hard to understand that kind of investigative technique.

What is the explanation? Well, that is something that this Committee is going to try to find out. At best, it looks like extraordinarily lax enforcement by the Securities and Exchange Commission. That is at best. And at worst, it has the overtone of a possible coverup. And those are difficult matters to ascertain, but we are dealing here with a very, very important subject.

We are dealing with communications between individuals where there appears to be inside information on a pending merger and some $11 million is gained by transactions related to that. And the matter is referred to the SEC, and nothing is done for 2 years. Then finally, when the investigation by Mr. Aguirre is picked up, those events occur.

Well, maybe it is just smoke and maybe there is no fire, but where you have hedge funds with as dominant a role as they are playing in the economy, more than $1 trillion, and their expansive nature in picking up smaller investors, pension funds, and this Committee is charged with oversight on enforcement, these are very, very important matters.

In reviewing the orderly sequence for today's hearing, I had wanted the witnesses who were at the table now as to panel one, but I believe it would be more efficient to alter the presentation.

So we are going to hear first from Associate Deputy Attorney General Ronald Tenpas and Connecticut Attorney General Richard Blumenthal. So if you gentlemen would step back, and Mr. Tenpas and General Blumenthal will step forward, and Ms. Linda Thomsen will be in the second panel.

Our first witness this morning will be Connecticut Attorney General Richard Blumenthal, an outstanding record in public service, having served in the Connecticut State Senate, State House of Representatives, and as a U.S. Attorney for the District of Connecticut, was law clerk to Justice Harry Blackmun, formerly assistant to

Senator Abraham Ribicoff, and Presidential assistant to Daniel Patrick Moynihan before he became a Senator; Phi Beta Kappa graduate of Harvard and law school from Yale and editor of the Yale Law Journal. Pretty good pedigree, Mr. Blumenthal. We welcome you here and look forward to your testimony.

STATEMENT OF RICHARD BLUMENTHAL, ATTORNEY GENERAL, STATE OF CONNECTICUT, HARTFORD, CONNECTICUT

Mr. BLUMENTHAL. Thank you very much, Mr. Chairman. I appreciate this opportunity to be with you again, and I want to thank you, as Chairman of this Committee, as well as the Committee itself for its leadership in this absolutely critical area, focusing not only on the specific instance—that you have just outlined so well—of potential problematic laxity in investigation, but also on the more general problems that arise with respect to hedge funds. And with your permission, I would like to present a much abbreviated version of my testimony and then have the full text entered in the record.

Chairman SPECTER. Attorney General Blumenthal, your full statement will be made a part of the record, as will all other statements, and we appreciate your summarizing.

Mr. BLUMENTHAL. Thank you.

As you very correctly observed, hedge funds have become more and more retailed in the financial markets to investors who are no longer the wealthy and sophisticated individuals who once were viewed as the sole kind of investors in hedge funds, and now the $1 trillion and 9,000 hedge funds that are involved in this industry span a much broader section of the American public.

But, equally important, they involved investment vehicles and instruments such as credit default swaps and increasing use of public offerings, bonds and so forth, that can impact the markets.

The investments in commodities, as we saw with Amaranth, can have a huge, sweeping effect on those markets and potentially for good, but also for ill. And so I think that the emphasis in the draft discussion bill on greater disclosure of risk strategy and of other very relevant factors in operation of hedge funds is absolutely going in the right direction.

I want to emphasize also the importance of protecting whistleblowers, and I think that point is directly relevant to the specific subject relating to Pequot Capital that brings us here today or has elicited the Committee's attention.

The kinds of rewards for whistleblowers we have found in our investigation, protection for people who are willing to risk their lives and livelihoods, their careers and reputations, is critical, and the idea of providing, for example, 30 percent of any sort of civil fines and penalties, as a maximum 30 percent, as much as 30 percent, is a very, very promising concept, and I think in my view, based on my experience in our investigation, is a very worthwhile avenue to pursue.

I want to also emphasize the importance of concurrent jurisdiction—it is mentioned in my testimony, but I think, again, it is an area that acquires even greater importance in light of the potential problems in the Pequot Capital investigation by the SEC—concurrent jurisdiction that enables States to be active participants and

partners, but also empowered to conduct their own investigations in this area if necessary has been one of the lessons, I think, in recent history, whether in securities, insurance, environment, the role of States in active, aggressive law enforcement where the Federal Government, either purposely or inadvertently, abandons the field or fails to be sufficiently aggressive is a lesson that I think is applicable here as well.

The kinds of experiences we have had in Connecticut with hedge funds, whether Amaranth or Bayou, others obviously across the country where there have been failures, I think emphasize the importance of that concurrent jurisdiction where States like Connecticut which have a very heavy representation of hedge funds can be an active participant is very important, in my view.

And, finally, I want to just emphasize one very important feature of changing the law that I think should be examined by the Committee. Raising the net worth or income levels that are required for participation in hedge funds is one of the most important steps that this Committee could take or that the SEC could take, because it will raise the bar, so to speak, and enable investors themselves to be of the type that can do their due diligence, that will have the assets and the sophistication that hedge funds initially were supposed to provide, and that hedge fund investors were supposed to have.

And so I would suggest, for example, that the net worth requirements be raised to $2 million—presently they are $1 million—or higher, and that the minimum income requirements for investors be raised far higher than the $200,000 now, as an alternative to that $2 million, perhaps on the order of $500,000.

These numbers are illustrative, as I indicate in my testimony, but, again, such requirements would help ensure that hedge fund investors are capable of doing the due diligence and assessing the risk that informed hedge fund participation requires.

I want to again thank the Committee for giving me this opportunity and look forward to continuing my contribution as someone who comes from a State where hedge funds are a big part of our economy. We want there to be Federal action rather than a patchwork of different State rules or guidelines.

We want the Federal Government to take the lead because we want to avoid disadvantaging hedge funds in any single State, and instead we should have uniform national rules, stronger protections for investors in disclosure and accountability than we do now.

Thank you.

[The prepared statement of Mr. Blumenthal appears as a submission for the record.]

Chairman SPECTER. Well, thank you, Attorney General Blumenthal. We appreciate your coming back to testify, and we appreciate what you are doing on the State level, and we thank you for being with us.

We have been joined now by Senator Grassley, who, as I had mentioned earlier, has taken the lead with the Finance Committee on inquiries into what is happening with hedge funds. He is chairing another hearing, so since he is a distinguished member of the class of 1980, one of the two remaining members of that class, I am going to yield to him at this time.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you. I appreciate your courtesies. I also appreciate your continued cooperation that you have given with my Committee in working on this issue.

I also ought to appreciate the cooperation of the Securities and Exchange Commission, and particularly Chairman Cox, in providing documents, information, and witnesses to both the Finance and Judiciary Committees during this investigation.

The SEC is recognizing the constitutional responsibility of Congress to conduct oversight of Federal agencies. A lot of other Federal agencies, especially Health and Human Services and the Justice Department, could learn a lot from this good example set by the SEC.

Now, today's hearing is the second by this Committee relating to penalties for criminal enforcement of illegal insider trading, and the third that has discussed the evolving role involving hedge funds.

And so I want everybody to know that I share Chairman Specter's concerns about the extent of insider trading and its impact on public confidence in the fairness and integrity of the stock market.

This Committee has jurisdiction over criminal laws, and with today's hearing we need to see if the laws on the books are strong enough to see that they are enforced in a way that Congress intended.

We are also here today to discuss allegations brought by the former SEC Attorney Gary Aguirre. His allegations led to a joint Finance/Judiciary Committee investigation on whether there was retaliation against this SEC lawyer for his role in the investigation of a large hedge fund. The Senate investigation also focused on the original investigation of these allegations by the Inspector General of the SEC.

Today we will hear about findings from the Senate Committees' investigation along with information learned through witness interviews and an extensive review of SEC documents. We will dig into why the Inspector General failed to uncover important evidence corroborating many of these allegations.

We will also question Mr. Aguirre's supervisors about the debate that went on inside the SEC about whether and when to ask a high-profile Wall Street executive some key questions during its insider trading investigation.

The resistance of the SEC to taking Mr. Mack's testimony until after the press and Congress put a spotlight on issues raised serious questions for me about whether captains of industry get the same treatment as regular investors or whether they get treated with kid gloves.

Finally, we will question Mr. Aguirre's supervisors about the SEC's personnel process and why they created an alternative negative evaluation of Mr. Aguirre that was not submitted into his personnel file until after they fired him.

I would like to hear how they can square that with his original positive evaluation and the pay increases that he got. It looks like that negative evaluation was only created after Mr. Aguirre started complaining to his supervisors that it was unfair to treat John

Mack differently than the SEC would treat an average investigation in the same situation. That is not a legitimate reason to go back and change an employee's performance evaluation.

These issues point to problems within the agency that distract from the core mission of protecting investors. This hearing can kick-start some necessary changes at the SEC. This hearing is about finding solutions as well as exposing problems.

I thank you, Mr. Chairman. I will be back to ask questions.

[The prepared statement of Senator Grassley appear as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Grassley. Thank you for your leadership and extensive work this on this important subject.

Senator GRASSLEY. Thank you.

Chairman SPECTER. We now turn to Associate Deputy Attorney General Ronald Tenpas, who has responsibilities including coordinating work by the President's Corporate Fraud Task Force and reviewing policy proposals related to preventing and punishing crimes in the corporate world.

Previously, Mr. Tenpas was U.S. Attorney for the Southern District of Illinois and an Assistant U.S. Attorney in both the Middle District of Florida and the District of Maryland. He clerked for Chief Justice Rehnquist and Judge Pollak of the Eastern District of Pennsylvania; bachelor's degree from Michigan, law degree from the University of Virginia, and a Rhodes scholar.

Thank you for being with us today, Mr. Tenpas, and the floor is yours.

STATEMENT OF RONALD J. TENPAS, ASSOCIATE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. TENPAS. Thank you, Senator Specter. Thank you for the opportunity to be back and talk again about this issue.

I thought in my opening I would focus my remarks on the bill's criminal provisions, the draft bill that you have shared with us, and try to highlight the effect some of those provisions would have on our criminal enforcement efforts.

As we discussed in my prior appearance here, there is a division of labor in this arena between the civil and criminal enforcement effort, with DOJ having the lead in the criminal enforcement arena.

Let me start my discussion with Section 4 of the bill. This section would amend Title 18, Section 1348, by adding a new subsection (b) that would expressly prohibit insider trading.

We believe it could be helpful to put insider trading offenses on a firmer statutory footing than they now stand, which is really as a species of judicially recognized Title 15 offenses where Title 15 prohibits schemes to deceive associated with the offering and sale of securities. So creating some statutory clarity here in that court-created arena could be helpful to us.

We do have a number of concerns about the specifics reflected in the bill. For example, the section is entitled "Willful misuse of material nonpublic information." Yet the new paragraph (b)(2)(1)(A)

incorporates a "knowingly" standard, while paragraph (b)(2)(1)(B) provides no explicit scienter requirement.

The new subsection (b) as currently worded introduces at least two substantial changes from current law. It eliminates the element that a person who is charged with insider trading be shown to have a "duty" with respect to that information.

We have concerns that eliminating this requirement potentially subjects to criminal sanctions those who might innocently come by valuable information and trade on it. Conversely, the draft bill essentially adds a new affirmative defense that trading on inside information is acceptable if that information was "gained by...research and skill."

Such a formulation will make it more difficult to prove insider trading than is the case under current law where no such defense exists. Similarly, some of the phrases, such as "of a specific nature" and the phrase "significant factor," which are included in the legislation, would impose burdens that we do not currently face, and so give us concern.

We think perhaps a better model may be to look to the definition of "insider trading" that the SEC has already promulgated through its regulatory process and then build from that if any adjustments are necessary. Obviously, we would be happy to work with you and other members of the Committee on such an effort going forward.

Similarly, in Section 4, paragraph (c), we welcome the effort to make clear the Department's authority to investigate insider trading offenses and to do so in a manner that involves express coordination with our partners at the SEC.

As you noted, there have been a couple of court decisions in this arena recently, and the United States has appealed one of those decisions that has, unfortunately, created potential barriers to the conduct of parallel investigations.

Thus, while we welcome the thrust of the effort to cure some of this, we would urge that any final decisions on how to respond be made after the appellate court releases its decision so that we can ensure that any legislation provides as comprehensive a fix as possible in light of where the law will stand at the time of that decision.

Even as that section is framed right now, there are things that we would hope to have a chance to work with you and the Committee on to perhaps tweak a bit. Proposed paragraph (c)(2) of Section 1348 would provide that neither the Attorney General nor any other Federal agency would have a duty to disclose any investigation or to disclose any contacts made with a companion agency to "request or receive evidence," is the language in the bill.

But we have traditionally coordinated our efforts with the SEC through more than just requesting or receiving evidence. Thus, this language might be argued to cut back on rather than to confirm the proprietary of some of these traditional coordination efforts.

And, similarly, the language in the proposed bill applies only to investigations of violations of "this section," i.e., Section 1348 of Title 18. Yet we continue to have parallel proceedings that involved other criminal provisions of Title 18 and Title 15, which could be equally frustrated or affected by these court decisions. And so,

again, we would be concerned about some of the particular language contained in the bill.

Let me also briefly turn to Section 5, the section to create incentives for private citizens to report and assist in the investigation of insider trading. We always welcome the assistance of private citizens who report criminal acts.

However, giving such substantial financial incentives to individuals to make criminal allegations would be a fairly dramatic departure from past practice in the criminal arena and will introduce new complexity for us and, thus, raise concerns.

Such financial incentives may produce not only meritorious allegations that are helpful, but also false allegations that can result in individuals being false accused.

It will be important grist for impeachment of key government witnesses, and we are concerned about whether the factors the statute indicates should be considered in fashioning a reward amount are meant to be exhaustive or only illustrative.

For example, we think it would be significant to consider whether the person who provides the information was himself complicit in the crime, and that is not a factor that is identified as a factor for consideration.

Let me conclude there. I have laid out in more detail in the written testimony other examples of specifics that we observe we would like the opportunity to work with the Committee on further.

Thank you.

[The prepared statement of Mr. Tenpas appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Tenpas.

I will include in the record at this point a statement from Mr. John P. Wood, Chief Executive Officer and Chairman of the Board of the Telus Corporation, a four-page analysis favoring the draft legislation.

[The prepared statement of Mr. Wood appears as a submission for the record.]

Chairman SPECTER. Mr. Tenpas, the jurisdiction of the Judiciary Committee led to the enactment of 18 United States Code 1348 Criminal Code in 2002, and the question I have for you at the outset is: How many indictments have been brought under that statute?

Mr. TENPAS. We have brought just over 50. I think the number is around 53, 54, something in that neighborhood.

Chairman SPECTER. And how many of those involved insider trading?

Mr. TENPAS. We do not have a good way to measure that, Senator.

Chairman SPECTER. Why not?

Mr. TENPAS. Because as I alluded to earlier, insider trading is a species of schemes to defraud, and so we simply—in our statistical programs that track this, we track the statute that has been charged. We do not necessarily track sort of the underlying theory that has been used. Is it insider trading? Was it accounting fraud or any of the other kinds of things that might be a violation of the statute?

Chairman SPECTER. Mr. Tenpas, insider trading is sufficiently important so that I think it would be very useful to this Committee if you would make that identification, because that is a little different species. So would you endeavor to do so?

Mr. TENPAS. We will do so.

Chairman SPECTER. Mr. Tenpas, just last Thursday, on November 30th, Mr. Michael Tom of Global Time Capital Growth Hedge Fund was given 3 years' probation in Boston involving a trading tip that Citizens Bank would be acquiring Charter One Financial. He made a $750,000 profit on that transaction and got 3 months' probation. Is that sentence adequate?

Mr. TENPAS. I am not—

Chairman SPECTER. You have been an Assistant U.S. Attorney in two districts, a U.S. Attorney in one district. The assistant prosecutors have a pretty good feel for that, and I recall my days as an Assistant D.A. Three months' probation for $750,000? That is more than you get paid, $250,000 a month. What do you think?

Mr. TENPAS. I am simply not familiar with the specifics. We would be happy to go back and look at it and advise the Committee of what went into fashioning that sentence. Obviously, as you are aware, the sentence ultimately is determined by the court, and I am not—

Chairman SPECTER. Oh, is that so?

Mr. TENPAS. I am not certain whether the United States made a particular recommendation in that case or not.

Chairman SPECTER. Well, is there any coordination on DOJ recommendations? The Department of Justice does make recommendations. We do know that it is up to the judge.

Mr. TENPAS. Certainly the United States Attorney's Office will—the prosecutor assigned to the case will typically make some—give some indication at the sentencing of the appropriate sentence.

Chairman SPECTER. Well, that is a pretty big case. I would have thought that you would have had some familiarity with that. You are in a key position. Aren't those matters brought to your attention for your input?

Mr. TENPAS. A case of that magnitude would not necessarily or routinely—

Chairman SPECTER. What magnitude would it take?

Mr. TENPAS. It is usually going to be bigger than that, in the several millions of dollars. Our U.S. Attorney's Offices routinely handle matters in which the loss or the fraud is in the hundreds of thousands of dollars, and so a case of that magnitude, given what you have described, is not something that I would routinely expect to come to officials in Washington.

Chairman SPECTER. Mr. Tenpas, let me suggest to you that $750,000 is significant and that it is a very bad sign to get 3 months' probation on that kind of a case.

Attorney General Blumenthal, there has been the overall approach that voluntary procedures within the industry would be sufficient, and after the Long Term Capital Management collapse 8 years ago, voluntary industry changes were implemented to control potential abuses in hedge funds.

And then as you noted in your testimony, Amaranth came along recently, some $9 billion in losses. How do you evaluate the overall

approach that the industry can regulate itself, that the bank's involvement puts them sufficiently at risk so that they will make independent inquiries and that it is not necessary to have governmental regulation?

Mr. BLUMENTHAL. I think that there is a growing consensus within the hedge fund industry that measures to require greater transparency are inevitable and necessary. The voluntary self-policing I think continues to put at risk lenders to the hedge funds, commodity markets, as well as individual investors that now include pension funds, university endowments, a much broader cross-section of the investing public.

Chairman SPECTER. When you mention voluntary procedures, just what does that involve?

Mr. BLUMENTHAL. Essentially it involves primarily the investor doing the due diligence and getting from the hedge fund information that is thought necessary about investment strategies, types of investments, degrees of return, past performance, baseline performance, compensation for hedge funds managers—all of the key areas that are identified in your proposed draft bill.

And I think that is one of the very central points about this draft bill, that it identifies that information, through Subdivisions A, B, C, D, E, the investment objectives and strategies, the risks, the side agreements, the extent of audits.

I think those are the key pieces of information that right now, to answer your question directly, are voluntarily provided, supposedly, by the hedge funds. The problem is that a lot of the investors, even some of the largest pension funds and endowments and others that should have that analytical ability, simply either lack it or are not provided with complete information. And right now there really is not the kind of oversight and scrutiny that this bill envisions for that truth-telling process, that disclosure.

Chairman SPECTER. Did Amaranth involve pension funds?

Mr. BLUMENTHAL. There were pension funds that lost money in Amaranth. Indeed, I believe one in California lost about $87 million, the pension funds of one of the cities in California.

And as you know also, Amaranth involved use of the electronic trading issues through the intercontinental exchange that right now is not subject to the kind of disclosure requirements that NYMEX is. So that is another area where hedge funds are involved in practices where more disclosure should be required by—

Chairman SPECTER. Were small investors involved in Amaranth as well?

Mr. BLUMENTHAL. I know some of them personally. Amaranth was and continues to be a Connecticut hedge fund. I think it is now non-operational, but many smaller investors in my own community, in Greenwich-Stamford, Connecticut, generally, were involved in Amaranth, as they were involved in Bayou.

Chairman SPECTER. Do you have any idea of how much they lost?

Mr. BLUMENTHAL. Well, the total losses probably were in the range of $6 billion out of the $9 billion that Amaranth had because $6 billion was approximately the amount that was invested in natural gas futures. But some of these were losses of life savings and some on the part of people who couldn't afford to lose them.

Chairman SPECTER. And when you talk about small investors, how do you define "small"?

Mr. BLUMENTHAL. Well, a small investor would, in my view, be anyone who cannot afford to lose the amount invested, and in different communities it may be different amounts.

Right now the million-dollar net worth threshold for an accredited investor in parts of Connecticut, New York, New Jersey, Pennsylvania, many areas of our country, is still a small investor, but many of the investors that I have in mind have net worths well below that $1 million.

Chairman SPECTER. Mr. Tenpas, what is your evaluation of the adequacy of these so-called voluntary industry practices to safeguard against inappropriate practices by hedge funds?

Mr. TENPAS. I think that is a little beyond the Department's ken. The President's Working Group on Financial Markets that is chaired by the Treasury Department includes the SEC, the Federal Reserve, and the CFTC is really the group that is looking at that, understands those markets and the way they work better than we do. And so I think I would have to defer to that group of folks to give you a sensible evaluation.

Chairman SPECTER. Well, OK. Let's come back squarely within your so-called ken. On the parallel investigations by the SEC and the Department of Justice, you do favor a change in the law or a specification in the law to deal with the Federal court decisions which have stricken prosecutions on the ground that it was inappropriate to have parallel or coordination between the SEC and the Department of Justice?

Mr. TENPAS. We would welcome, I think, some clarification. We think those cases were wrongly decided, so I would be reluctant to say that we think a change in the law is needed. There have been a couple of cases decided since the *Stringer* case that have rejected some of the language in *Stringer* and the *Scrushy* case. So I am not sure we need a change, but we need some clarification that the view we have taken is, in fact, the correct view of—

Chairman SPECTER. Clarification that you can have parallel investigations appropriately.

Mr. TENPAS. Yes. I think clarification that the Department and the SEC or other similar regulatory agencies can communicate with each other about and coordinate their investigations for appropriate purposes.

Chairman SPECTER. When you mention that we ought to await the decision by an appellate court, what is the status there? How long do we have to wait?

Mr. TENPAS. It is still being briefed. Oral argument has not been held, so it would probably be, at best, sometime this spring, early summer. It is in the Ninth Circuit so it is a little hard for us to predict how long they would have it under advisement.

Chairman SPECTER. So you think it might happen sometime next year.

Mr. TENPAS. I think so.

Chairman SPECTER. Congress has a pretty good record at waiting, even without a specific reason, but I think this is something we really ought to be acting on.

Attorney General Blumenthal, you talk about protecting whistleblowers. I agree with you. It is not easy to come forward and to make an identification, but it is indispensable to have real law enforcement. You are a prosecutor. Mr. Tenpas was. We know from our common experience how hard it is to gather this information which is done behind closed doors and in secrecy.

Do you think the current protections for whistleblowers are adequate?

Mr. BLUMENTHAL. Overall, I think not, Mr. Chairman. I think there needs to be a stronger shield, protection against retaliation, indirect as well as overt, and direct forms of revenge or retaliation.

Often, as you know, they can be subtle, pernicious, but long-lasting on a person's career. We see it at the State level, obviously, which is the arena where I practice now. Just yesterday, as a matter of fact, my office produced a report that culminated a 13-month investigation of the Internal Affairs unit of our State Police that resulted from State Troopers themselves having the courage and conviction to come forward with complaints about a system that was in disarray.

And we have protected those whistleblowers. We are able to do so as best we can at the State level. But we need the kind of rewards, I think, and incentives that your draft bill proposes.

As well as the shield, we need the kind of incentives that will provide a financial security—maybe the best way to characterize it—for people who come forward and take the risk that government may not be able to protect them.

We saw it in the tobacco cases where we were guided initially by whistleblowers, now well known, but, arguably, the States would not have had the evidence and the guidance that we needed there without whistleblowers from the tobacco industry. Again and again what we see is not just disclosure of information, but also providing a road map.

As you know from your prosecutorial days, and I am sure Mr. Tenpas does as well, one of the classic tactics of potential defendants is to deluge prosecutors with documents. Having a road map, having someone to guide that effort, to pinpoint the documents that are critical, often is invaluable. And, again, whistleblowers provide that service.

So I apologize for the long-winded answer, but I believe that a greater measure of protection, as you have sought, as the Committee is seeking to do in this bill, is absolutely vital.

Chairman SPECTER. That is not long-winded at all, Mr. Blumenthal, by Senate standards.

[Laughter.]

Chairman SPECTER. Well, thank you very much, Mr. Tenpas and Attorney General Blumenthal. We very much appreciate your testimony.

Mr. Tenpas, if you would followup on those outstanding issues, and, Attorney General Blumenthal, keep going.

Mr. BLUMENTHAL. Thank you very much, Mr. Chairman.

Mr. TENPAS. Thank you.

Chairman SPECTER. Thank you very much.

We will now turn to Mr. Aguirre, Mr. Stachnik, Mr. Hanson, Mr. Kreitman, Mr. Berger, Mr. Ribelin, and Ms. Thomsen.

At this point I will put into the record a lengthy analysis of six pages by Mr. Mark Kasowitz of the Alliance for Investment Transparency, dated September 4, 2006, in support of the draft legislation.

[The prepared analysis of Mr. Kasowitz appears as a submission for the record.]

Will all of you please stand for the administration of the Oath? Raise your right hands. Do each of you solemnly swear that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, subject to the laws on perjury?

Mr. AGUIRRE. I do.
Mr. STACHNIK. I do.
Mr. HANSON. I do.
Mr. KREITMAN. I do.
Mr. BERGER. I do.
Mr. RIBELIN. I do.
Ms. THOMSEN. I do.

Chairman SPECTER. May the record show that each of the witnesses has said "I do."

Mr. Aguirre, thank you for returning to testify before this Committee. Mr. Aguirre is a former senior counsel with the Division of Enforcement in the Securities and Exchange Commission, has nearly 40 years of litigation experience, including the areas of construction disputes, environmental regulations, securities litigation, and criminal defense; published many scholarly legal articles, including one arising from litigation from the Enron debacle and the application of Section 10(b) of the Securities Act for fraud; bachelor's degree in politics and a law degree from the University of California at Berkeley; a master of fine arts from UCLA and a master of law from Georgetown University Law Center.

Thank you for being with us, Mr. Aguirre, and we look forward to your testimony again.

STATEMENT OF GARY J. AGUIRRE, FORMER INVESTIGATOR, SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, D.C.

Mr. AGUIRRE. Thank you, Senator Specter. I would like to express my gratitude for the time that your staff has taken to look into this matter and your leadership in looking into this matter.

Before I touch on the Pequot case, I would like to speak briefly about the SEC's track record on the subject you are looking at. The SEC has brought—and I am talking, of course, about insider trading investigations of hedge funds, and specifically those that result—

Chairman SPECTER. Mr. Aguirre, is your microphone on?

Mr. AGUIRRE. I will move a little closer. Specifically about SEC cases that have been filed against hedge funds for insider trading. It is a short record. There are six cases. Three of those cases are PIPEs cases. PIPE transactions are a filament, a tiny, tiny, thin aspect of our capital markets. Last year they were $20 billion. Compare that, for example, with our merger and acquisitions market, which is $1.46 trillion. Half the focus was on this.

On all the other types of insider trading, whatever it is—mergers, acquisitions, tips before earnings, tips before drugs—every-

thing else, there are three cases. The total recovery in those three cases is $110,000. That is the track record of the SEC in pursuing insider trading with the exception of the PIPEs cases, and in the PIPEs cases they recovered $25 million.

Now, those three cases deserve a little more comment. Two of them involved tiny, tiny hedge funds, and the third, it took them 5 years to file a case.

Now, I would like to talk for a moment about the Pequot case, and in particular on the date of June 14th. On that date, I was meeting with Mr. Hanson and Mr. Kreitman. I was reviewing for them the status of the case at that moment. I had reviewed the status of the evidence involving Pequot itself, Mr. Samberg, and as well as Mr. Mack. That day, they authorized me to meet the next day with the FBI and the U.S. Attorney and present the same facts to initiate a criminal investigation.

Now, that is a serious matter. That is why I was so shocked when, 9 days later, they would not permit the issuance of an administrative subpoena for Mr. Mack's testimony. Of course, something had changed during those 9 days.

On June 23rd, the Wall Street Journal announced that Mr. Mack would be a candidate as the CEO for Morgan Stanley. On June 22nd or 23rd, Mr. Hanson explained to me that I could not issue that subpoena for Mr. Mack for one reason, and he gave me only one reason, and that reason was his powerful political contacts.

Chairman SPECTER. Mr. Hanson told you that?

Mr. AGUIRRE. Face to face, twice that week.

Now, that event was followed very quickly by a phone call from Morgan Stanley in which I was told by Morgan Stanley's compliance officer, "We've got a problem with Mr. Mack if you guys are going to go after him."

That investigation vanished in a week, and in that same 7 days, Mr. Mack went from a candidate for CEO to CEO. The rest of my time I continued minding the evidence against Mr. Mack. I continued presenting that evidence. And every time I presented it, the bar went up another notch and the bar went up another notch. And, finally, it was a 9-foot bar.

I would like to say just a few words about my evaluations. They were touched on by Senator Grassley, the remarkable way I had a re-evaluation out of nowhere. I read this morning the testimony that has come in from the SEC and the attacks. I have not seen a single piece of paper backing anything that they have said through my history with the SEC, and I have been trying to get them through FOIA and Privacy Acts.

Thank you. I think my time has run out.

[The prepared statement of Mr. Aguirre appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Aguirre.

Mr. Hanson, I am going to go to you out of order so that you will have a prompt opportunity to respond to Mr. Aguirre's statement that he and you face to face had an exchange where, according to Mr. Aguirre's testimony, you told him not to proceed with an administrative subpoena as to Mr. Mack because, as Mr. Aguirre puts it, of his powerful political contacts. The floor is yours, Mr. Hanson.

STATEMENT OF ROBERT B. HANSON, BRANCH CHIEF, DIVISION OF ENFORCEMENT, SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, D.C.

Mr. HANSON. Thank you, Senator Specter. I did not say that to Mr. Aguirre, as he states. I have no recollection of making that statement. In fact, I had no knowledge at all about Mr. Mack's political connections at that point.

I certainly knew that Mr. Mack was a very high profile individual, but I had no idea until I read in the New York Times recently about Mr. Mack's political connections. I didn't even know what a Ranger was until I read that in the New York Times and looked it up. So I had no idea what that was at the time Mr. Aguirre alleges that I told him that.

Chairman SPECTER. You may proceed with your testimony generally, Mr. Hanson, as you choose.

Mr. HANSON. Thank you, Senator Specter. Thank you for the opportunity to testify today and to respond to false allegations of abuse of authority that have been advanced by a former staff attorney of the United States Securities and Exchange Commission. I appreciate the opportunity to set the record straight on the matter about which Mr. Aguirre testified to this Committee last summer.

I have spent my entire legal career in Federal Government service, currently a branch chief at the SEC, where I have worked for approximately 8½ years. Every day I get the chance to work with motivated professionals dedicated to the agency's mission. It is a great honor and privilege to do so.

Let me state that in my experience the Division of Enforcement of the SEC has never considered an individual's political connections in deciding whether to take his or her testimony. No one has ever asked or suggested that I refrain from taking a person's testimony because of his or her political connections. In conducting and supervising investigations, I have followed the evidence wherever it leads, even if the trail points to a prominent executive or a public figure.

In the investigation concerning the hedge fund Pequot Capital, I have no reason whatsoever to believe any outside source ever attempted to influence a decision on taking the testimony of anyone.

I supervised Mr. Aguirre before he was terminated. I found him to be highly energetic, but his conduct was erratic and unprofessional. It was extremely difficult to communicate with Mr. Aguirre, and miscommunications were common.

Information that Mr. Aguirre presented as fact often turned out to be mere speculation, and he omitted information that did not support his hypothesis. He did the same thing in his written testimony he provided today.

Failing to bring to the Committee's attention the inconvenient fact that CS First Boston counsel had told Mr. Aguirre that the individual who Mr. Mack met with before Mr. Mack joined CS First Boston did not even have the information that Mr. Aguirre had relied on to support his theory that Mr. Mack had received the information from CS First Boston before joining the firm.

One by one, Mr. Aguirre alienated the other staff attorneys and the assigned trial attorney on the case, treating them with open hostility for no valid reason. At least twice, Mr. Aguirre angrily

stormed out of the office during the workday after disagreements with other attorneys in the spring of 2005.

Both times he said he was going to think about what he was going to do, which I understood him to mean that he was planning to leave the Commission. He formally tendered his resignation in June 2005, but later withdrew that resignation. I learned that he had withdrawn his resignation through the grapevine rather than from him directly, even though I was responsible for staffing the case.

Mr. Aguirre then said he would be willing to work to complete the investigation but would not document his findings, which was essential to completing the investigation. It became apparent that Mr. Aguirre was a significant risk to leave at a moment's notice, regardless of the impact such action would have on the investigation. His erratic behavior and the negative impact it had on the other attorneys on the case, on the investigation compelled me to strongly urge that Mr. Aguirre be terminated before his probationary period ended.

I was not the first supervisor to recommend that Mr. Aguirre be terminated. Mr. Aguirre's public assertion that the Pequot investigation was halted is utterly false. After he was terminated, the Division of Enforcement continued the investigation unabated, devoting hundreds of hours to the matter.

After Mr. Aguirre's termination, investigative staff took testimony from or interviewed more than a dozen individuals, made numerous formal and informal document requests, reviewed and analyzed thousands of documents, and participated in two proffer sessions with the FBI and the Office of the U.S. Attorney for the Southern District of New York. No shrinking violets.

Ultimately, after a thorough investigation, we closed the matter after finding insufficient evidence to warrant bringing an enforcement action.

While at the SEC, every investigation I have worked on has been conducted with fairness, diligence, and integrity. We did so in the Pequot investigation.

Thank you. I would be glad to answer any questions you may have.

[The prepared statement of Mr. Hanson appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Hanson. I want to make it a part of the record as to your background. You are Branch Director in the SEC's Division of Enforcement, and you were Mr. Aguirre's immediate supervisor at the time of his termination.

Prior to joining Enforcement, you were a staff attorney with the SEC's Office of Compliance and previously had served with IRS in the Office of Chief Counsel; a graduate of the University of Delaware and the University of Maryland School of Law.

Mr. Hanson, let me bring up at this point as a matter of sequence a couple of memoranda, one from you to Mr. Aguirre dated August 4th, or an e-mail, which you have involved with other comments this statement, "Mack's counsel will have 'juice' as I described it last night, meaning that they may reach out to Paul and Linda and possibly others."

Do you recollect writing that statement?

Mr. HANSON. I do.

Chairman SPECTER. What did you mean by "juice"?

Mr. HANSON. Well, as I explained in my written testimony, although I had no reason to know who would represent Mr. Mack if he was called to testify, I knew he would retain experienced SEC counsel, who would likely, as is not uncommon, directly contact my superiors about the testimony.

Chairman SPECTER. A second written communications was from you to Mr. Kreitman dated August 24th, and the second paragraph says, "Most importantly, the political clout I mentioned to you was a reason to keep Paul, and possibly Linda, in the loop of the testimony.

As far as I know, politics are never involved in determining whether to take someone's testimony. I've not seen it done at the agency. It does make sense, though, to have all your ducks in a row before approaching a significant witness like Mack; hence, the reason to try to figure out a number of things about him before scheduling him up, not the least of which is whether he knew about the deal."

Was there some special precaution or preparation you took as to Mr. Mack within the context that, as I have quoted here your statement, politics are never involved in determining whether to take someone's testimony? Was there any special precaution taken as to Mr. Mack?

Mr. HANSON. The precaution I did want to take was I wanted to see what information we could learn about Mr. Mack before trying to take his testimony. And as I do mention in that e-mail, politics have never been involved in deciding whether to take someone's testimony.

Chairman SPECTER. We are going to go now to Ms. Linda Thomsen, who is the Director of the Securities and Exchange Commission's Division of Enforcement, joined the Securities and Exchange Commission in 1995; prior to that served as Assistant U.S. Attorney for the District of Maryland; bachelor's degree from Smith and a law degree from Harvard University.

I am going to have to take you out of sequence, Ms. Thomsen, at this time because I think that there ought to be as early an opportunity as possible to respond to Mr. Aguirre, and then we will have further questioning. But you may proceed at this time.

STATEMENT OF LINDA C. THOMSEN, DIRECTOR OF ENFORCEMENT, SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, D.C.

Ms. THOMSEN. Chairman Specter, thank you for inviting me to testify today. I have submitted written testimony and ask that it be made part of the record.

Chairman SPECTER. Your statement will be made a part of the record.

Ms. THOMSEN. Thank you, Mr. Chairman.

I would like to start briefly on some of the broader issues that you raised in the first panel, and as that earlier panel discussed and, indeed, as Mr. Tenpas and I discussed with the Committee earlier this fall, the pursuit of illegal insider trading is an important and challenging part of the overall enforcement of the Federal

securities laws. The same is true for illegal activity by hedge funds, important and challenging.

We at the SEC are committed to pursuing enforcement actions related to insider trading and to hedge funds. Indeed, insider trading cases typically constitute 8 to 12 percent of our filed cases in any given fiscal year. As to hedge funds, and purported hedge funds, they are a growing focus of our efforts.

Just to illustrate, in fiscal year 1999 we had one case involving a hedge fund. During the last three fiscal years, in each year we have brought in excess of 20 cases, and since that time, since 1999, over 100.

The cases against hedge funds fall into two general categories: abuses that are directed at the investors in the funds, and abuses that are directed more at the market, such as insider trading or market manipulation. To date this fiscal year, which has just started, we have already brought two cases involved hedge funds. We very much appreciate your support of this important work.

My written testimonies both for today and from September go into greater detail on some of the programmatic issues, but I think it is important, in light of your expressed concern about the investigation of Pequot, to address it here very briefly.

As you indicated, a former SEC attorney has alleged that the investigation was impeded and he was terminated because he sought to take the testimony of a prominent individual. Speaking for the Division of Enforcement, these allegations are simply not true.

After an unhappy probationary period of employment, the former employee was terminated on September 1, 2005, because of his inability to work effectively with other staff and his unwillingness to operate within the Securities and Exchange Commission process.

As discussed in the SEC's termination letter, which is attached to my testimony, he had continued personality conflicts with other staff, he resisted standard supervision, and he ignored the SEC's chain of command.

Despite these problems, the SEC attempted to accommodate him. He was, at his request, transferred from his original supervisor to a supervisor he selected and about whom he now bitterly complains.

He also requested and received official time to pursue an unsuccessful age discrimination claim against the SEC for failing to hire him on 22 prior occasions. The EEOC denied those claims in a thorough written opinion, which is also attached to my testimony.

Regarding the substance of his work, among other things he issued, without his supervisor's review or approval, subpoenas that violated Federal privacy law, which were withdrawn after his supervisor's learned of them.

But for the supervisor's corrective actions, the former employee's work product could have been extremely damaging to the SEC, and his continued resistance to supervision created a substantial risk of future error. After the SEC had expended considerable effort to make the employment relationship work, we decided not to extend his employment beyond the 1-year probationary period.

Moving to the investigation of Pequot, the potential insider trading by Pequot, as well as other potential securities law violations, were thoroughly investigated. The investigation was conducted in

large part by staff other than the former employee and was continued long after he left.

Ultimately, we did not find sufficient evidence to support an enforcement action. Accordingly, our investigation was closed for lack of evidence. The closing memorandum summarizes the many hours of hard work by the SEC staff that did this investigation, and it too is attached to my testimony.

Finally, and perhaps most importantly, Mr. Chairman, the three supervisors working on the Pequot investigation collectively have decades of experience and have brought some of our toughest cases. They are also, each of them, smart, dedicated, and honorable.

Their decisions in Pequot were not influenced by who any potential witnesses were but, rather, by the facts and the evidence. This is consistent with the finest traditions of our agency.

We follow the facts, and if those facts take us to John or Jane Doe, or some more famous John or Jane, so be it. We have gathered evidence from and about, and in some instances we have sued, captains of industry, Presidential Cabinet members, Members of Congress, and celebrities, as well as thousands of people who are less well known. Indeed, a long list of prominent and not-so-prominent individuals would undoubtedly testify that the Enforcement Division does not pull its punches.

I want to assure you and the Committee that we are passionate about our work and we will pursue it with vigor, skill, and fairness. And I, too, would be happy to take any questions.

[The prepared statement of Ms. Thomsen appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Thomsen.

We turn now to Mr. Mark Kreitman, Assistant Director, Division of Enforcement, of the SEC, supervises a 15-lawyer investigative group and was one of Mr. Aguirre's superiors during his time at the SEC. Previously, Mr. Kreitman served as Assistant Chief Litigation Counsel for the Division of Enforcement, and prior to joining the SEC was a partner at Shea & Gould; holds an undergraduate degree from Yale and a law degree from Harvard.

We appreciate your being with us, Mr. Kreitman, and look forward to your testimony.

STATEMENT OF MARK KREITMAN, ASSISTANT DIRECTOR, DIVISION OF ENFORCEMENT, SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, D.C.

Mr. KREITMAN. Thank you very much, Chairman Specter. I have also prepared written testimony, which I request be made a part of the record.

Chairman SPECTER. It will be made a part of the record.

Mr. KREITMAN. Thank you for the opportunity to testify. The concern raised in this inquiry was the possibility that political influence may have distorted the Commission process.

I can say categorically that no such thing affected the conduct of the Pequot investigation, Mr. Aguirre's termination, or the decision not to take testimony from John Mack while Mr. Aguirre worked at the Commission.

The Pequot investigation was pursued with vigor and professionalism after Mr. Aguirre departed. When all reasonable leads

were exhausted, the relevant individuals questioned and documents examined, it was recently closed with no action taken.

As you have indicated, I have been an Assistant Director and before that an Assistant Chief Litigation Counsel—trial lawyer—with the Division of Enforcement for 19 years and have received a variety of awards and commendations.

I have investigated or tried cases against a department head at a major New York law firm, a president of a Beverly Hills bank, the son of a prominent local banker, First Jersey principal Robert Brennan, and numerous Wall Street luminaries.

I brought one of the cases, insider trading cases, against a major hedge fund within the past year and a half, and I recommended successfully the largest whistleblower award that the Commission has offered. In 26 years of public service, I have played a role in recovering nearly $1 billion for investors and for the government.

Mr. Aguirre was a student of mine at Georgetown, where I teach as an adjunct and have since 1999. I advised him and supervised his master's thesis, which, as you indicated, was published in a number of journals. We became friends and socialized together, and that, Senator, has made this entire episode particularly painful for me and for my wife.

When Mr. Aguirre graduated from Georgetown, he had not practiced law for a number of years. He had no experience in enforcement investigation. He was unfamiliar with a closely supervised working environment like the Commission, where investigative zeal must be tempered by a respect for the rights and legitimate interests of citizens and where collegiality and mutual respect is the hallmark.

Mr. Aguirre was a hard worker but, unfortunately, treated his colleagues who questioned him or his methods with disrespect, bordering on contempt. He was unable to fairly and impartially balance evidence against his preconceived conclusions or articulate his thinking in a linear fashion. He viewed all supervision, direction, even inquiry concerning his work as unwarranted intrusion.

Beginning in June 2005, he came to believe that John Mack tipped Pequot about the GE/Heller acquisition. He heatedly insisted that we subpoena Mr. Mack before he had evidence that Mr. Mack had access to inside information or indeed, any potentially inculpatory evidence with which to confront Mr. Mack.

His supervisors, with, as Ms. Thomsen has indicated, more than 40 years combined Commission experience, instructed him of the need for proper foundation to invoke compulsory process and that premature testimony would likely be fruitless because Mr. Mack could simply deny any illegal activity or any connection to the suspicious trading.

Mr. Aguirre concluded that this proved a widespread conspiracy to thwart him and protect an individual no more significant or powerful than people from whom we take testimony every day—including during this same time period a former U.S. Senator and a former high-ranking White House official.

Toward the end, Mr. Aguirre's behavior became increasingly unprofessional, irresponsible, and erratic. He threw what can only be fairly described as "tantrums," storming down the halls in a furious crouch, abruptly leaving the office without leave, resigning at least

twice, necessitating that, despite severely limited resources, we were required to double staff his investigation. Finally, as Mr. Hanson mentioned, he announced that he refused to write up his investigation in the required formal memorandum.

Mr. Aguirre did receive a two-step increase effective shortly before his termination. That was for the rating period that ended 4 months earlier on April 30. He was a new employee. He worked a great many hours. I wanted to encourage and help him readjust after a troubled beginning in another group.

His subsequent behavior, however, so far exceeded the bounds of acceptable professional conduct that it was incumbent upon me and his other supervisors to supplement and correct that overly generous evaluation, which we did on August 1, a month before Mr. Aguirre's termination.

I would be happy to answer any questions, Senator.

[The prepared statement of Mr. Kreitman appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Kreitman.

Mr. Kreitman, in your written testimony you state that Mr. Aguirre's theory regarding John Mack as a potential tipper was a "highly suspect and illogical conclusion." And yet I note on a written communication, a June 3, 2005, e-mail to Aguirre that, "Mack is another bad guy (in my view.)" Was that your memorandum or was that a memorandum from Mr. Hanson?

Mr. KREITMAN. I do not believe those were my words, Senator.

Chairman SPECTER. Not your words.

Mr. KREITMAN. I do not believe so.

Chairman SPECTER. Were those your words, Mr. Hanson?

Mr. HANSON. I believe they were.

Chairman SPECTER. Why did you say that Mr. Mack was another bad guy?

Mr. HANSON. I can't remember why I said that at that time. In hindsight, I was trying to encourage probably the investigation to wherever it led, and looking back in hindsight, those words are probably inappropriate. I have subsequently met Mr. Mack, and—

Chairman SPECTER. You don't remember?

Mr. HANSON. I am sorry?

Chairman SPECTER. You do not remember?

Mr. HANSON. I do not remember.

Chairman SPECTER. Well, it was your written testimony that Mr. Aguirre's theory regarding John Mack as a potential tipper was a "highly suspect and illogical conclusion." Do you still stand by that?

Mr. HANSON. I do.

Chairman SPECTER. But you can't explain why in a memo contemporaneously with these events back on June 3rd that you said Mack is "another bad guy (in my view)"?

Mr. HANSON. I can't remember why I sent the first e-mail. That is correct.

Chairman SPECTER. Well, was Mack another bad guy, in your view?

Mr. HANSON. At the time that I wrote that, I can't remember the basis for which I wrote it. But I certainly do not believe Mr. Mack is a bad guy.

Chairman SPECTER. It did not come out of thin air, did it, Mr. Hanson? Is this your statement at that time?

Mr. HANSON. It was.

Chairman SPECTER. Your statement at that time.

Mr. HANSON. That is correct.

Chairman SPECTER. "Bad guy."

Mr. HANSON. Correct.

Chairman SPECTER. But you don't know any reason you had to say that.

Mr. HANSON. Excuse me?

Chairman SPECTER. You don't know any reason that you had to say that at that time?

Mr. HANSON. The only thing I can think of, sitting here today, is that he had the reputation as Mack the Knife.

Chairman SPECTER. Well, tell me a little bit more about the reputation. What was his reputation as Mack the Knife?

Mr. HANSON. I think he had the reputation of—again, his name was—or his nickname was Mack the Knife because he had terminated a number of employees when he went to work at a couple of brokerage firms.

Chairman SPECTER. Because Mr. Mack had terminated employees?

Mr. HANSON. I believe that is correct.

Chairman SPECTER. Anything else?

Mr. HANSON. No.

Chairman SPECTER. Well, terminating other employees, why would that lead you to call him a bad guy?

Mr. HANSON. Again, Senator, I cannot remember why I wrote that e-mail, and thinking back today, I just can't come up with anything other than that.

Chairman SPECTER. OK. We now turn to Mr. Paul Berger, partner at Debevoise & Plimpton; joined the Securities and Exchange Commission in 1992 and served as senior counsel, branch chief, Assistant Director, and Associate Director; and in his latter capacity, he oversaw Mr. Kreitman's unit.

Prior to joining the SEC, he practiced law with Jenner & Block and was a staff attorney to the D.C. Circuit Court of Appeals; undergraduate degree with honors from American University, and a law degree from the Antioch School of Law.

We appreciate your being with us, Mr. Berger, and the floor is yours.

STATEMENT OF PAUL R. BERGER, FORMER ASSOCIATE DIRECTOR, DIVISION OF ENFORCEMENT, SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, D.C.

Mr. BERGER. Thank you, Chairman Specter. Good morning. Thank you for the invitation to appear before this Committee today and to respond to allegations of abuse of authority that have been made by a former staff lawyer with the United States Securities and Exchange Commission.

I believe that accountability and oversight are healthy, and I commend you, Mr. Chairman, for taking these matters seriously. Indeed, I welcome the opportunity to respond to these allegations.

For months now, allegations have circulated around town about this matter that the SEC and I have been unable to respond to because of our obligation to refrain from discussing confidential SEC investigations. Finally, we have a chance to put these allegations to rest, for they are completely false.

As background, let me give you a sense of who I am. I spent 14 years as a career law enforcement officer for the United States Securities and Exchange Commission, the last 6 of which as an Associate Director of Enforcement.

As an Associate Director, I had anywhere from 150 to 200 open investigations under my indirect supervision, as well as supervising current litigation. I authorized the opening of the Pequot investigation before Gary Aguirre joined the Commission because I believed then, as I do now, that hedge funds play an important role in our capital markets.

And I, along with my colleagues, wanted to ensure that hedge funds conduct their affairs consistent with the laws prohibiting insider trading. When issues arose as to possible insider trading, I decided that, despite the considerable age of this particular matter, we should take a hard look.

As I am sure you are aware, insider trading investigations are some of the most difficult cases to make. Establishing that someone had material nonpublic information and used that information to violate the anti-fraud provisions of the Federal securities laws is exceedingly difficult. In fact, it is more difficult than making a financial fraud case. Nevertheless, we opened the Pequot matter to look into concerns about possible insider trading.

Now, there have been various allegations about that investigation that need to be addressed.

First, I have heard that the SEC's investigation was stopped. Nothing could be further from the truth. Not only did the investigation continue for a year after Gary left, but we added two terrific staff lawyers to the case because, in part, we had become concerned with Gary's reliability since he had resigned on a number of occasions.

Next—and this is particularly key—the major issue that we confronted in the investigation was not if we would take Mr. Mack's testimony but when we would take it. As I told Gary at least twice, the SEC is not and never has been afraid to take anyone's testimony. What we needed to do in the Pequot investigation was to get our ducks in a row. We needed to do our homework before we took Mr. Mack's testimony.

The SEC supervisors made a judgment based on years of experience conducting SEC investigations, and particularly insider trading investigations, that the best time to take the testimony was at the conclusion of the investigation when all of the evidence had been assembled, all of the leads had been run down, and when the U.S. Attorney, who I had contacted in the first instance about this matter, had reviewed the evidence and completed their investigation. It was our professional judgment that the best and most efficient use of our resources was to conduct the investigation in this manner.

Now, there are those who might say, well, what is the harm in taking the testimony when Gary wanted? Well, that would be an

interesting standard for determining when to take testimony: as long as we do no harm. But that is not the standard.

Now, experience shows that the most efficient and productive way to conduct an investigation is to take testimony when you have marshalled all of the facts necessary to take the witness. As I am sure you are aware as a former prosecutor, taking the testimony of witnesses multiple times creates a murky and sometimes unusable record.

There has also been the suggestion that Mr. Mack was given special treatment when in 2005 lawyers not for Mr. Mack, but for Morgan Stanley's Board of Directors called to see if Mr. Mack had regulatory exposure.

Both my Assistant Director and I told counsel that it was premature to draw any conclusions about the investigation. That was the right call. Why? Because it was consistent with SEC policy not to disclose confidential information about the investigation.

I told counsel that we could not say whether Mr. Mack had any exposure or not, that we could not help Morgan Stanley with its decision; it would have been inappropriate for SEC staff to insert itself in a regulated entity's business decision. That was true since, at the time, as Gary admits, we didn't know whether Mr. Mack had violated the law.

This investigation was conducted like every other investigation. Experienced supervisors made sure that we were balancing all of the facts and the evidentiary record and making the correct professional judgments. One can disagree with those professional judgments. That is fine. But it is beyond the pale when one turns those judgments into a conspiracy that ropes in SEC supervisors and the Commissioners themselves.

I was a public servant who worked for 14 years on behalf of our Nation's investors and our capital markets. I tried to bring a passion for my work each and every day. Not a day passed that I did not ask whether a judgment that we made was the right thing to do. I believed then and I believe now that our judgments were sound and our investigations were exemplary.

Thank you. I would be happy to answer any questions and ask that my testimony that was submitted be made part of the record.

[The prepared statement of Mr. Berger appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Berger.

We now turn to Mr. Eric Ribelin. He joined the SEC in 1988, currently Branch Chief in the Division of Enforcement's Office of Market Surveillance; previously served as a market surveillance specialist and senior market surveillance specialist; numerous honors at the SEC, including Chairman's Award for Supervisory Excellence in 2002 and Enforcement Division Director's Award in 2000; bachelor's and master's degree in economics from Eastern Illinois University.

Thank you very much for your contribution here, Mr. Ribelin, and we look forward to your testimony.

STATEMENT OF ERIC RIBELIN, BRANCH CHIEF, OFFICE OF MARKET SURVEILLANCE, SECURITIES AND EXCHANGE COMMISSION, WASHINGTON D.C.

Mr. RIBELIN. Thank you, Mr. Chairman. I do not have any opening statements.

Chairman SPECTER. Mr. Ribelin, there is a document which you sent to Mr. Hanson, a memorandum or communication from you to Mr. Hanson, dated September 9, 2005, re: Pequot saying this, "Bob, I have serious misgivings about many decisions made in this investigation. I don't know what all has driven the decisions. Something smells rotten, though. I am accusing you of nothing. You seem like a good guy, and you are certainly a good soldier. But I am nonplussed by issued big and small about the course of events going back to January. I really do need to contemplate my involvement going forward."

Mr. Ribelin, what did you mean by "something smells rotten"?

Mr. RIBELIN. Mr. Chairman, we had an aggressive investigation into possible insider trading by Pequot and possible stock manipulation. Gary Aguirre is a tenacious investigator. He had an aggressive investigation. In my judgment, he was professional.

We had a very worthy adversary, the best lawyers, the smartest lawyers who could be hired to defend, and they were extremely aggressive, and let me give a couple of examples. In a subpoena requesting the production of e-mail, we frequently didn't get production of those e-mails in a timely fashion.

We took testimony of witnesses and had documents that had been subpoenaed to be associated with testimony of those witnesses, and documents would show up in the 11th hour prior to testimony or on the day of testimony. And it is extraordinarily difficult to conduct a testimonial session when we do not have documents.

Repeatedly, Mr. Aguirre attempted to hold the feet to the fire of the attorneys on the other side to get e-mail production pursuant to subpoena, to get documents produced on time so that we could take testimony and do it appropriately.

He continued to aggressively try to enforce the subpoena, if you will, and continued to go to his supervisors to get assistance from them that these subpoenas get enforced internally. And there was certainly a period of time when Mr. Kreitman and Mr. Hanson seemed to agree with Gary.

But I can tell you that I was surprised from January of 2005 that Paul Berger, who had a reputation for being an aggressive and smart attorney, did not seem as though he was aggressive in supporting the attempts of Mr. Aguirre to get subpoenaed documents on time and to get e-mail production so that we can conduct an investigation. That is one example of what I was referring to when I said "something smells rotten."

That went through a very long period of time of the investigation where it was my sense that there was not the support for the aggressiveness and the tenacity of the investigator.

There are other examples I can give you.

Chairman SPECTER. Would you please do that?

Mr. RIBELIN. I can do that. As I said, for a very long period of time, we had a hard time getting e-mail production, and I can tell

you that if you subpoena a document or subpoena e-mails and you don't get them, you are not going to be able to do the investigation. And so we continued to push.

There was a period of time when a very significant, large portion of e-mails were put out of our ability to get a hold of and to examine. Part of the reason given was because these e-mails may be privileged e-mails, communications between attorney and client.

We thought certainly there was a possibility that some of those e-mails fell into that category, but there was a very large number of e-mails that we suspected fell outside of that category. And there was one point that an attorney was hired who had custody of some of those e-mails—I can't remember how many thousands they were. Mr. Aguirre was not allowed by Mr. Kreitman to speak to that attorney about trying to get production of e-mails. To this day I don't know why that is.

And I can tell you that Mr. Mack had been the CEO of Morgan Stanley. He was being courted to become the CEO of CS First Boston. We did not have information that he had material nonpublic information as it related to the GE/Heller merger. That is for sure.

It was Gary's theory—I agreed; I think other people supported the idea—that it wasn't unlikely, it was certainly possible that he could have gotten access to the information based on the fact he had been the former CEO of Morgan Stanley and he was being courted at the time by CS First Boston of the trades engaged in by Pequot.

After the word came down that the testimony of John Mack was not going to be taken, I had a conversation within a week or so of that with Bob Hanson, and Bob Hanson said to me that because Mr. Mack was a prominent person or because he had connections—I don't remember exactly how he put it—that we would have to be careful about taking his testimony, we would have to, my impression is, move maybe more carefully than we would if it was somebody other than somebody of prominence. And I said, "Well, Bob, if that is the case or not, just call him up on the phone instead of bringing him in for testimony and ask a couple of basic questions."

And this is something, by the way, that Gary proposed, Gary Aguirre proposed a couple of times. Mr. Hanson didn't respond to me.

And then finally, of course, Gary Aguirre was fired when he was on vacation. I was stunned. I was outraged. And the e-mail that you just referred to was soon after these events.

Chairman SPECTER. Mr. Hanson, do you recall the comment that Mr. Ribelin has testified to, that you called Mr. Mack a "prominent person" and then suggested that there would have to be treatment of him a little different?

Mr. HANSON. I certainly felt he was a prominent person and I wanted to, as I have said to Mr. Aguirre and Mr. Ribelin, make sure we had our ducks in a row before taking Mr. Mack's testimony. And what I meant by that was, let us figure out what we can about whether he had the information before taking his testimony.

Chairman SPECTER. Well, what would you be looking for as to what information that he would have had?

Mr. HANSON. Whether he had the information regarding the deal, whether he had the inside information. I mean, there are hundreds of suspects or possible witnesses we could take the testimony from, almost an endless number of them.

One of the things you want to try to look at as a criterion is whether or not they have access to the information. These merger and acquisition deals are highly sensitive matters within investment banking firms and they do not give that information out willy nilly.

Chairman SPECTER. Well, it is not a matter of who else has access. It is a question of whether Mr. Mack would have access. And is it not true that, in his position with Credit Suisse, that he did have information about the prospective merger between GE and Heller in the July of 2001 timeframe?

Mr. HANSON. After he joined Credit Suisse First Boston, it is certainly entirely likely that he would have had that information, but prior to that time, no. That is the trading period we were looking at, prior to that time.

Chairman SPECTER. How about that, Mr. Aguirre? What time period was in question?

Mr. AGUIRRE. The timeframe in question was from July 2 through July 25. There were three dramatic trade moves by Mr. Samberg during that time. July 2, he opened the trading. July 9 to 10, he went from 15,000 shares to 450,000 shares, in terms of what he was trying to buy. Then on September 25, he shorted.

Now, that fit perfectly with the timing of Mr. Mack. Mr. Mack, according to Mr. Padalino, who was CSFB's attorney, told me that Mr. Mack had met with the CSFB people on approximately June 28 or June 29.

Chairman SPECTER. So Mr. Mack had met with people who had the insider information prior to the July timeframe you testified about?

Mr. AGUIRRE. Well, he met with CSFB. I was told he met with CSFB people at that time on June 28. Now, that is coming from the lawyer on the other side. Of course, I would want to verify that and talk to Mr. Mack: who exactly did you meet with?

Chairman SPECTER. But that would have required questioning Mr. Mack.

Mr. AGUIRRE. That would require it.

Chairman SPECTER. But there was that contact in late June, June 28, as you testify.

Mr. AGUIRRE. That was the first one.

Chairman SPECTER. Let me finish the question.

Mr. AGUIRRE. Sorry, sir.

Chairman SPECTER. Where Mr. Mack would have had access to the inside information.

Mr. AGUIRRE. Potential access to that information.

Chairman SPECTER. Well, how about it, Mr. Hanson?

Would that not establish the necessary predicate for questioning Mr. Mack?

Mr. HANSON. Mr. Aguirre believed that Mr. Mack may have gotten the information from—I think one of his hypotheses was that he may have gotten it as part of a courting process with CS First Boston. It seemed highly unlikely that CS First Boston, in courting

Mr. Mack, would tell him confidential, nonpublic information about a deal in their courting process.

Not only that, but Mr. Aguirre was told by CS First Boston counsel—and this is the part that he excludes from his testimony to the Senate—that the person that Mr. Mack met with did not have the information.

Chairman SPECTER. Well, what other information did you have about Mr. Mack's potential involvement when you finally did take his deposition, 5 days after the statute of limitations expired?

Mr. HANSON. When we finally took Mr. Mack's testimony, subsequent to Mr. Aguirre's termination, we had actually gone to CS First Boston, subpoenaed their records to see whether or not the people that Mr. Mack had met with actually had the information. We first did that.

Chairman SPECTER. And did you find they did have the information?

Mr. HANSON. We did not.

Chairman SPECTER. Why did you wait so long to subpoena those records?

Mr. HANSON. We subpoenaed them September 1, the day that Mr. Aguirre was terminated, so there was no time delay at all.

Chairman SPECTER. Why was Mr. Mack's deposition taken so long after that?

Mr. HANSON. I am getting there. We subpoenaed CS First Boston records. We did an extensive e-mail review of Mr. Mack's records. We found additional exculpatory evidence that sort of suggested that the likelihood of Mr. Mack being the tipper was minuscule.

We turned our attention and our focus to another transaction that Pequot was engaged in in approximately November of 2005. We followed that through until approximately June of 2005.

At that point, we decided whether or not we were going to take additional individuals in connection——

Chairman SPECTER. When was that?

Mr. HANSON. I am sorry. 2006. Additional individuals in connection with the GE Heller transaction. At that point in time we took the testimony, before the statute of limitation expired, of the individuals at CS First Boston who potentially could have passed the information on to Mr. Mack.

Chairman SPECTER. Why not take Mr. Mack's deposition before the statute of limitations expired?

Mr. HANSON. We took the testimony of the two individuals who could have given Mr. Mack the tip or the information before the statute of limitations expired. If we found out from them that Mr. Mack had gotten the information or they had the potential of giving the information to Mack, we probably would have sought a tolling agreement. We sought tolling agreements from Pequot in March of 2006.

Chairman SPECTER. Well, that is all very interesting about tolling agreements for somebody else. But you did not seek a tolling agreement for Mr. Mack.

Mr. HANSON. I do not think we could have. We did not have the evidence that he had the information.

Chairman SPECTER. All right. If the tolling agreement is out, I wonder why you mentioned it. If it was not relevant to Mr. Mack,

why did you wait until after the statute of limitations had expired to take Mr. Mack's testimony?

Mr. HANSON. We took Mr. Mack's testimony, as I described in my written statement, which I will ask to be made part of the record.

Chairman SPECTER. But that does not tell us why you waited until after the statute of limitations had expired.

Mr. HANSON. We got to it as soon as we could. The predicate to trying to figure out whether to take Mr. Mack's testimony or not was whether he had the information.

We did not think, at the time that we took Mr. Mack's testimony, that there was any—there was virtually no likelihood, by the time we took Mr. Mack's testimony, that he had any information regarding the transaction that he could have passed on.

Chairman SPECTER. So why did you take his testimony?

Mr. HANSON. As I explained in my written statement, one consideration was the harm Mr. Aguirre had caused by taking this confidential, nonpublic investigation public for his own purposes, and the need to maintain public investor confidence in the work of the Division of Enforcement.

Mr. KREITMAN. Senator, I wonder whether I could clarify.

Chairman SPECTER. You may, Mr. Kreitman, but in just a minute.

Mr. Hanson, did the fact that this Committee held a hearing on June 28 have any effect on your moving ahead with Mr. Mack's deposition, or was that just entirely coincidental?

Mr. HANSON. No. I think that, as I said, one consideration in taking Mr. Mack's testimony was the harm Mr. Aguirre had caused by taking the confidential, nonpublic investigation public.

Chairman SPECTER. Mr. Kreitman, if you wanted to add something there, you are welcome to do so.

Mr. KREITMAN. Yes. Thank you, Senator. I would just like to clarify that the statute of limitations you referred to bars only penalty. It does not bar injunction. It does not bar other equitable remedies. It does not bar disgorgement of illegal profits or pre-judgment interest.

Chairman SPECTER. But there is a significant limitation on what can be done after a statute of limitations expires. Is that not correct, Mr. Kreitman?

Mr. KREITMAN. That is correct, Senator. It does preclude imposition of penalties, financial penalties. That is the only impact.

Chairman SPECTER. Mr. Kreitman, you heard what Mr. Ribelin said about the effort by Mr. Aguirre to acquire e-mails and your refusal to back him up on that. Do you want to comment on that?

Mr. KREITMAN. I do not think it is accurate. It is not uncommon for us to encounter push-back when we send out broad subpoenas. In this case, the subpoenas—and I believe there were more than 100 of them that Mr. Aguirre sent out—resulted in the production of, I believe, more than 19 million e-mails.

I considered it so important to try to enforce these subpoenas—and it is unusual—I became personally involved in negotiation with Pequot's counsel. We do have available to us the remedy of subpoena enforcement in the District Courts, however, our experience is that that is neither a speedy, nor efficacious, remedy.

But, short of bringing a subpoena enforcement action, I believe that we did everything that we could to facilitate and expedite production of documents in response to our subpoenas.

Mr. AGUIRRE. Senator, may I just dip in my oar on that comment for just a moment?

Chairman SPECTER. Yes, you may, Mr. Aguirre. Anybody who wants to comment as we proceed here, if you feel that something has been said which bears on your own participation in the matter, feel free to ask for recognition because the Committee wants to give you, as we always do, every opportunity to explain or comment as to anything which is said, because this hearing is filled with accusations, counter accusations, and denials. So if you have any denials to make, do not wait for me to ask.

Go ahead, Mr. Aguirre.

Mr. AGUIRRE. I think that Mr. Ribelin was referring to the prohibition of my speaking to attorneys who had control of the documents. Those two attorneys were a former Commissioner of the SEC, Irving Pollack, and another attorney by the name of Larry Storch. They were some of Mr. Kreitman's closest friends. Mr. Storch was a next-door-neighbor.

Mr. Hanson pointed out to me, it was very troubling that they had been brought in exclusively to deal with documents which I thought were a critical aspect of that case, and Mr. Kreitman had given me an injunction not to talk to them about those critical documents. I think that was what Mr. Ribelin was speaking about.

Let me just add a couple of points of why I suspected Mr. Mack. It was not just one contact on June 28 or June 29 that I had been told about by Mr. Padalino that came just before Mr. Mack talked with Mr. Samberg, which had come just before Mr. Samberg suddenly started trading ferociously the next trading day.

But again, there was another contact by Mr. Mack on July 9 with CSFB. The following day, Mr. Samberg's trades jumped from 15,000 to 450,000 in terms of his order. Then once again on July 25, when Mr. Mack was already there and obviously had access to that information, it fit with the fact that Mr. Mack began shorting. So, there were those three connections.

Then during the phone call on June 29 between Mr. Mack and Mr. Samberg, Mr. Mack got into a deal for $5 million. He got a piece of a deal that nearly tripled in 8 months. Nobody else got into that deal.

Chairman SPECTER. What was that deal related to?

Mr. AGUIRRE. It was called Fresh Start. There was an e-mail saying that he had been "beating on Mr. Samberg's chops" on June 20 to get into this deal. Then he talks with the CSFB people. He calls them on June 29. That night, he gets into this deal.

If you look at the SEC filings, you will see that he put in his $5 million on October 15, and in late February of 2006 it was announced that that was paying about 3:1 on what he had put in. Nobody else got into those kinds of deals except Mr. Mack. Pequot got nothing out of that. So the question is, how come he got that favor at the same time that we think he gave the tip back going the other way?

Chairman SPECTER. Mr. Hanson, any idea as to why Mr. Mack would be benefited, as Mr. Aguirre just described?

Mr. HANSON. I am sorry. I did not follow your question.

Chairman SPECTER. Mr. Aguirre has set forth a sequence of events. First of all, he mentioned three contacts—not one contact, three contacts—between Mr. Mack and people who had the inside information, and the contacts that Mr. Mack then had with Mr. Samberg.

Were you aware of all of those matters? Mr. Hanson. Mr. Mack did not have contact with those three people during the timeframe that Mr. Aguirre alleges.

Chairman SPECTER. Mr. Aguirre——

Mr. AGUIRRE. Let me——

Chairman SPECTER. Let me finish my question.

Mr. AGUIRRE. I am sorry.

Chairman SPECTER. Be specific about them so Mr. Hanson can comment on them, please.

Mr. AGUIRRE. It is in my written testimony.

Chairman SPECTER. Mr. Hanson, have you seen Mr. Aguirre's written testimony?

Mr. HANSON. I looked at it last night for a brief period of time.

Chairman SPECTER. Go ahead, Mr. Aguirre.

Mr. AGUIRRE. The cases talk about looking at the trades and looking at the contacts. In this case, we saw three dramatic moves by Mr. Samberg: July 2, July 10, and July 25. We know that Mack met with CSFB just before the July 2 trade, and we know that he talked to Mr. Samberg just before that trade.

Mr. HANSON. The first of those is inaccurate.

Chairman SPECTER. Were you aware of that, Mr. Hanson?

Mr. HANSON. Of the fact that he did not meet with the individual from CS First Boston, as Mr. Aguirre alleges.

Chairman SPECTER. He did not?

Mr. HANSON. He did not.

Chairman SPECTER. Mr. Aguirre, how do you know that he did?

Mr. AGUIRRE. Well, I was told by Patrick Padalino, who was the CSFB attorney, that that contact had occurred around the 28th or the 29th. Now, I was relying on what the attorneys from CSFB were telling me, because I could not ask Mr. Mack.

I, to this day, think that there were likely more contacts in exactly that timeframe involving Mr. Mack or CSFB. Perhaps Mr. Hanson can enlighten us whether Mr. Mack was in fact meeting with people from Credit Suisse or CSFB during this timeframe around June 27 or June 28. I was told of one version by Mr. Padalino, the attorney. I relied on that.

Chairman SPECTER. Had you informed Mr. Hanson about what you had learned from Mr. Padalino?

Mr. AGUIRRE. Absolutely. They were all in my e-mails.

Chairman SPECTER. Is that true, Mr. Hanson?

Mr. HANSON. He had informed me that Mr. Padalino had told him that Mr. Mack may have met with CS First Boston's CFO approximately 2 weeks before he joined Credit Suisse First Boston. That was not correct.

Chairman SPECTER. What was not correct?

Mr. HANSON. He did not meet with Mr. Mack during that timeframe.

Chairman SPECTER. How do you know that?

Mr. HANSON. I took the testimony of the CS First Boston CFO.

Chairman SPECTER. You had contrary information at that time, Mr. Aguirre?

Mr. AGUIRRE. Yes, I did, at that time. And I think, more importantly, the question is, what did Mr. Mack say about his meetings with Credit Suisse during the 27th, 28th, and 29th of June? He took his testimony. They should know.

Chairman SPECTER. Was Mr. Mack questioned about that, Mr. Hanson?

Mr. HANSON. Of course.

Chairman SPECTER. And what did he say?

Mr. HANSON. That the information that Mr. Aguirre alleged or speculated that Mr. Mack may have had was so far down in the weeds for Mr. Mack.

Chairman SPECTER. So far down in the weeds?

Mr. HANSON. It was so far removed from what he was doing with respect to negotiating with CS First Boston that it had no relevance to him. Not only that, but the people from CS First Boston that we talked to and received the e-mails from said that there is no possible way that they had the information, let alone passed it on to Mr. Mack.

Chairman SPECTER. Mr. Hanson, back to the question which was pending a few minutes ago. Were you aware, as Mr. Aguirre has just testified, that Mr. Mack was afforded an investment opportunity by Mr. Samberg which enabled him to triple his investment?

Mr. HANSON. I am aware that Mr. Mack was often an investor alongside Pequot in private investments.

Chairman SPECTER. Now answer my question.

Mr. HANSON. I guess I do not follow your question.

Chairman SPECTER. My question, again, is were you aware, as Mr. Aguirre has testified, that Mr. Mack was offered an investment by Mr. Samberg which enabled him to triple his investment.

Mr. HANSON. I do not know the specific facts for the investment that Mr. Aguirre is referring to. I know that one of the investments that Mr. Mack put money into with Pequot around that time, he lost all the money on. In another one, he doubled the money on.

Chairman SPECTER. I am interested in what he lost money on. I am interested in a lot of things. But not today. What I want today is an answer, if you learned from Mr. Aguirre—and this is the last time I am going to ask it—that Mr. Samberg gave Mr. Mack an opportunity for an investment that he tripled.

Mr. HANSON. I do not believe so. I think there was an investment. I am not sure, again, on the facts, which one doubled and which one he lost money on, which one he is referring to.

Chairman SPECTER. Was there one that doubled?

Mr. HANSON. I think so.

Chairman SPECTER. Was that different from the one that tripled?

Mr. HANSON. I am not aware of one that tripled.

Chairman SPECTER. Did Mr. Aguirre tell you about one that tripled?

Mr. HANSON. Not to my recollection.

Chairman SPECTER. Mr. Hanson, let us come to the—

Mr. KREITMAN. Senator, I wonder whether I could respond to something both Mr. Ribelin and Mr. Aguirre have said.

Chairman SPECTER. If you would like to respond, Mr. Kreitman, you have the floor.

Mr. KREITMAN. Thank you. Thank you, Senator. Just to correct the record, Mr. Storch is not, and has never been, a next-door-neighbor of mine. He is, however, a classmate from law school and a friend.

Mr. Pollack is not only a former Commissioner, but the first Director of Enforcement of the Commission and an icon in this field, someone whom I regard as a mentor and a giant in the field.

Nonetheless, as both Mr. Ribelin and Mr. Aguirre have testified here, I directed them not to speak to Mr. Pollack or Mr. Storch for a very simple reason, and that was that they did not represent any party in the investigation.

As I advised Pequot's lawyers, I would be pleased to deal with them myself, and have my staff deal with them, if we were advised that they represented, and could therefore bind, Pequot.

But if they were to occupy, as was proposed, an undefined, inchoate role in discovery production but could neither speak for nor bind any party to the investigation, then I was unprepared to have my staff deal with them.

Chairman SPECTER. Mr. Aguirre, on page 21 of your testimony you have stated that "SEC filings indicate Mack did extremely well on his $5 million investment" and in Footnote 116, you say that "the value of Mack's interest would have been approximately $16.43 million."

Would you amplify what went on here which is the basis for your saying that Mr. Mack had an investment that tripled in value?

Mr. AGUIRRE. Yes. During the conversation on June 29, the night that we thought that Mack gave Samberg the tip, that night Mack got promised to get into Fresh Start. He had been trying to get in it for some time. There is an e-mail the next day of June 30 confirming the fact that he got into Fresh Start that night.

Fresh Start is actually Salient Corporation. If you go to the SEC filings of Salient Corporation for the beginning of February, 2002—there is a series of SEC filings—you can track the history. He put the $5 million into Salient on October 15, 2001. He got 3,333,000 shares. He got in on the same exact terms and conditions that Pequot got into in the same company.

In February, the company was bought out by the Andrews Corporation for $467 million, but $82 million of that had to go to somebody else. The bottom line, after you sort that out, there was approximately $300 and some million. If you took the amount of the shares, the percentage of the shares that Mr. Mack got and simply did the mathematics, it came out to around $16 million.

Chairman SPECTER. Mr. Hanson, before yielding to Senator Grassley, I want to take up the subject of the pay increases and the ratings of Mr. Aguirre.

Is it not true that Mr. Aguirre received two favorable reviews in September of 2004 and then April of 2005?

Mr. HANSON. Mr. Aguirre, I think, received sort of a "pass/fail" rating in, probably, April or March, thereabouts, of 2005.

Chairman SPECTER. Would you tell the Committee why there was a supplemental evaluation which led to Mr. Aguirre's termination?

Mr. HANSON. Well, I would not say it led to Mr. Aguirre's termination. But we did draft a supplemental evaluation for Mr. Aguirre on August 1, 2005.

Chairman SPECTER. Was it not highly unusual to have that kind of a supplemental evaluation?

Mr. HANSON. I had never drafted one before, but I felt it was appropriate in Mr. Aguirre's case.

Chairman SPECTER. I take that as a "yes" answer.

Mr. Kreitman, is it not highly unusual to have that kind of a supplemental evaluation?

Mr. KREITMAN. Well, at that time, Senator, I had only participated in the evaluation process once before, and I had not done it in that case. So, I do not know, really, more generally than that.

Chairman SPECTER. Well, have you ever seen a supplemental evaluation under analogous circumstances?

Mr. KREITMAN. Prior to becoming an assistant director, I had never seen any evaluations.

Chairman SPECTER. Well, you were on the pay raise committee, were you not?

Mr. KREITMAN. No, I was not.

Chairman SPECTER. Mr. Berger, was this not a highly unusual thing to have a supplemental evaluation?

Mr. BERGER. I think it was fairly rare, Mr. Chairman, to do a supplemental evaluation.

Chairman SPECTER. Fairly rare? Happened one time in the past only?

Mr. BERGER. Oh, I could not say how many times it happened in the past.

Chairman SPECTER. Do you know if it is happening at all?

Mr. BERGER. I think it has happened, yes.

Chairman SPECTER. Do you know when it happened in the past?

Mr. BERGER. No, I do not. I am saying that I think it is rare. What I was going to say is that——

Chairman SPECTER. Well, this is a pretty important point here. With the overtone that suddenly there is a change in evaluation, a supplemental evaluation, something the Committee is very concerned about, if this had been something that had been done in the past, would you not have checked that out before coming in to testify today?

Mr. BERGER. I am sorry. I am not at the SEC and I do not have access to that information.

Chairman SPECTER. You are what?

Mr. BERGER. I am not at the SEC so I do not have access to the information.

Chairman SPECTER. I know. But you are a witness in a matter which involved you on the evaluation of Mr. Aguirre and a supplemental evaluation.

Mr. Aguirre, what happened in this situation?

Mr. AGUIRRE. Well, of course, I did not know anything about any reevaluation until they fired me, but I have been able to track what has happened.

Chairman SPECTER. You were never told you were being reevaluated?

Mr. AGUIRRE. No. I had to dig that out. I had to press these guys to get the records, and they finally gave it to me in October.

On June 1, I got the first evaluation "acceptable on all grounds", which qualified me for a merit pay increase. On June 17, I submitted my evaluation. On June 29, Mr. Hanson forwarded the evaluation, saying my work was of high value, and made some very positive comments. For example, that I "went the extra mile, and then some".

Now, I understand between June 29 and July 18, everyone, with the exception of Linda Thomsen, approved that merit pay increase. On July 18, the Compensation Committee met and approved it.

Now, between July 18 and July 27, Linda Thomsen approved it. But on the evening of July 27 at 5:30, I sent Mr. Berger an e-mail for the first time saying to him, this investigation has been stopped because of Mack's political power.

He did nothing in response to that e-mail. That is, he did not say, come on in, let us talk about it, let us get to the bottom of this. Two days later, he reevaluated me. That is the sequence.

Chairman SPECTER. Mr. Hanson, there is a form here which is designated "Merit Pay Supervisor Transmittal Form—Employee's Name: Gary Aguirre. Supervisor's Name: Robert Hanson". Are you familiar with this document, or would you like to see it up close?

Mr. HANSON. I am familiar with it.

Chairman SPECTER. You are familiar with it. On June 29, 2005, you checked off the category here, "Made Contributions of High Quality".

Mr. HANSON. That is correct.

Chairman SPECTER. Well, what was it that changed your view as to his qualifications?

Mr. HANSON. As I indicated in my written statement, the evaluation prepared for Mr. Aguirre was based on his work for the 3-month period, from the date Mr. Aguirre joined my group through April 30, 2005.

Chairman SPECTER. And Mr. Kreitman, are you familiar with a document dated June 1, 2005 concerning "Performance Plan and Evaluation" as to Mr. Aguirre?

Mr. KREITMAN. Yes, I am, Senator.

Chairman SPECTER. You are familiar. Where you checked off "Knowledge of Field or Occupation: acceptable. Planning and organizing work: acceptable. Execution of Duties: acceptable. Communications: acceptable."

Mr. KREITMAN. Yes, Senator.

Chairman SPECTER. That was your evaluation of Mr. Aguirre on June 1 of 2005.

Mr. KREITMAN. Yes, it is.

Chairman SPECTER. Why the change?

Mr. KREITMAN. Well, Senator, Mr. Aguirre was a probationary employee. If I had rated him "unacceptable" in any of those four critical performance evaluation standards, it would effectively have terminated his employment at that time.

Chairman SPECTER. He ultimately was terminated.

Mr. KREITMAN. That is correct.

Chairman SPECTER. If he is unacceptable, why should he not be terminated?

Mr. KREITMAN. He should be.

Chairman SPECTER. If he is acceptable, why was he terminated?

Mr. KREITMAN. He was not acceptable at the time that he was terminated, Senator, at the end of his probationary period.

Chairman SPECTER. Well, what was the change that moved from "Acceptable" in all those categories to "Unacceptable"? Is it not a curious coincidence, Mr. Kreitman, that at the time he is pursuing these matters which are not meeting with favor by Mr. Hanson, Mr. Kreitman, and Mr. Berger, that suddenly there is a reevaluation, highly unusual, and all of these qualifications where he is "Acceptable", and where Mr. Hanson says, his immediate supervisor, "Made Contributions of High Quality". Suddenly there is a change and he is fired?

Mr. KREITMAN. Senator, the only respect in which Mr. Aguirre's professional judgment received disfavor by any of his supervisors was, as Mr. Berger indicated, with respect to the timing of the testimony of Mr. Mack.

However, it was Mr. Aguirre's behavior and conduct, the contemptuous way in which he treated his colleagues, the unprofessional way in which he dealt with opposing counsel, his refusal to accept any kind of directional supervision, that led to his termination.

Chairman SPECTER. Well, he worked there for a long time. He got these very favorable ratings on June 29, and a favorable rating from you, "Acceptable", on June 1. Then on September 1, 2 months later from the Hanson evaluation and 3 months later from your evaluation, suddenly he is fired.

Mr. KREITMAN. Well, Senator, he did not work there for a long time. He was a probationary employee. He worked in our group from February until September and, perhaps erroneously in retrospect, we were very generous with him. We wanted to encourage him. I had promised him that when he came to my group after having very serious difficulties in another assistant director group, that I would give him a fresh start.

He worked an enormous number of hours with very great energy and diligence, therefore, in my judgment and in the judgment of his other supervisors, I believe, he made a highly valuable contribution.

That is very different from the basis upon which he was terminated, which was his inability to work within a closely supervised, structured, and collegial environment.

Chairman SPECTER. Senator Grassley?

Senator GRASSLEY. Before I ask questions, I would like to ask that a list of documents that I will hand to you now would be included in the record of today's hearing. Also then, before they are included, it would be necessary for your Committee and my Committee staffs to make appropriate redactions.

Chairman SPECTER. Without objection they will be made a part of the record, as will all of the documents which have been referenced during the course of the testimony be made a part of the formal record.

[The documents appear as submissions for the record.]

Senator GRASSLEY. Yesterday's written testimony was submitted by the witnesses for today's hearing. Mr. Hanson, in your testi-

mony you discuss Mr. Aguirre's performance when he took the testimony of Arthur Samberg. You stated, "It was reported to me that Mr. Aguirre behaved unprofessionally and was extremely disorganized during the testimony."

Mr. Hanson, were you present at any of the testimonies that Mr. Samberg gave?

Mr. HANSON. I was.

Senator GRASSLEY. You were there?

Mr. HANSON. Your question was, was I present at any of the testimonies that Mr. Samberg gave.

Senator GRASSLEY. Yes.

Mr. HANSON. I was.

Senator GRASSLEY. You were there.

Mr. HANSON. I think, just to clarify the record, I was not at the testimonies that Mr. Aguirre took of Mr. Samberg.

Senator GRASSLEY. All right.

So you would have no direct knowledge of what took place at Mr. Aguirre's testimony of Mr. Samberg.

Mr. HANSON. Other than reading the transcript, I would not have direct knowledge.

Senator GRASSLEY. All right.

Hilton Foster, who I understand is an ex-Securities and Exchange Commission expert on insider trading cases, was there. He has over 30 years' of experience at the SEC and he trained new attorneys at the SEC.

He testified in an interview with Committee investigators that "did I think anything happened in there that was unusual or unprofessional? No." Foster continued, "There was a portion there where I said, 'this is dynamite stuff here.' Further, I remember being impressed with the way that Gary did the testimony."

Mr. Foster later stated that he was going to use that transcript in his training of other attorneys.

Mr. Hanson, who was your source that said Mr. Aguirre behaved unprofessionally?

Mr. HANSON. This was a senior counsel in my group.

Senator GRASSLEY. And he was an attorney with the SEC.

Mr. HANSON. That is correct.

Senator GRASSLEY. Or was he an attorney for the defense bar?

Mr. HANSON. He was an attorney with the SEC.

Senator GRASSLEY. All right.

Did you ever check what you had heard about the testimony with Mr. Foster?

Mr. HANSON. I did not.

Senator GRASSLEY. Why not?

Mr. HANSON. The attorney that gave me that information is an individual I think highly of. I respect his judgment. He has been doing litigation for a number of years, so whatever he says to me I generally take as a given.

Senator GRASSLEY. How about Mr. Ribelin? Did you ask him about Gary's conduct during the testimony?

Mr. HANSON. I did not.

Senator GRASSLEY. Well, let us ask Mr. Ribelin.

You were there. Do you think that Gary did a good job questioning Arthur Samberg?

Mr. RIBELIN. Absolutely.

Senator GRASSLEY. Mr. Stachnik, as you know, I was troubled about your inquiry into Mr. Aguirre's allegation from the beginning. I have to tell you, the more I learn, the more troubled I get.

Your office did little more than look at his letter to Chairman Cox, call his supervisors, accept what they told you at face value. Just calling up people accused of wrongdoing and asking them if they did it is not my idea of an investigation that you should have performed.

You did not talk to any of the people at the SEC who identified in his letter as agreeing with him. You did not contact Mr. Aguirre to get more detailed information or learn whether he had evidence to support his claims, which it turns out he did.

Since you did not talk to Mr. Aguirre, you closed the investigation without even looking at an e-mail from Mr. Hanson where he admits to talking about John Mack's "political clout". In short, you only got one side of the story and you did not seem very interested in getting the other side.

In my opinion, an Inspector General is supposed to be independent-minded. When a whistleblower comes forward, you should take these allegations seriously, not help play defense for the SEC. So my first question is, can you explain why your office was not more aggressive in looking at these allegations when they were first brought to your attention last year?

Mr. STACHNIK. Senator, we did do a professional and thorough investigation, in my judgment, at the time. We did assign the most senior staff in my office to this matter. They did review documents, e-mails. They analyzed metadata, as well as interviewing the personnel within the SEC.

My judgment in this matter was that the allegations in the two letters that came from Mr. Aguirre to Chairman Cox, the allegations were not validated by the investigation. These included Mack's testimony not being taken. That was a matter of timing rather than whether or not it would or would not be taken.

It included the phone call between Linda Thomsen and, I believe it was Mary Jo White, although I may be mistaken about that, which we determined was normal communications between the Director of Enforcement.

We looked at documents which indicated that Mr. Aguirre did have access and did participate in lots of meetings concerning all of the matters he claimed he was not invited, and did not participate in the meetings.

We looked at the allegation about his personnel file and found out, through analysis of metadata, that the supplemental evaluation, unlike the allegation, was prepared back in an appropriate time and it was not post-dated.

We also determined that his termination was based on a dysfunctional relationship between himself and his supervisors. It was pretty obvious that it had been going on. Based on contemporaneous memos, e-mails, and so forth, it was pretty obvious that it was going on for a long period of time. This was not something that came up suddenly.

Senator GRASSLEY. Well, does it not bother you, if your office is independent of the SEC and you can do your work as an Inspector

General ought to do the work, and does it not raise a red flag when somebody says that you ought to be careful because somebody has got a lot of political clout?

I mean, after all, you are talking about an independent agency. But any place in the government. When you start worrying about somebody that has political clout, you are not doing your job.

Mr. STACHNIK. I agree, Senator. That is the reason that we did open the investigation. I was very disturbed by the allegations that were made by Mr. Aguirre. The investigation was designed to validate those allegations.

Senator GRASSLEY. Well, let me ask you, do you still stand by the closing memorandum that you did? If so, why did you reopen the investigation?

Mr. STACHNIK. The reason that I decided to reopen the investigation was a combination of factors. The serious concerns expressed by the Senate, your Committee and Senator Specter's committee, were clearly part of that decision. The concerns expressed to me by Chairman Cox of the SEC was also part of that decision.

In my estimation, we did a professional and rigorous investigation. However, we are not infallible. We are taking another look at the matter. That is the reason we reopened it. I reopened it.

Senator GRASSLEY. All right.

Well, my last question is going to followup on that. Your office made no written document request to the SEC before closing this initial investigation. Yet, after Congress started raising questions, you did reopen it, as we just discussed, and have since issued a broad subpoena to Mr. Aguirre calling for records of his communication with this Committee and with my own Finance Committee.

You are now attempting to have the Justice Department enforce that subpoena in court, even though you are aware that we have raised constitutional objections to your office seeking confidential communications between a whistleblower and a Congress about an ongoing Congressional inquiry, which includes questions about the effectiveness of your office, which, if you are successful, you might as well close down the whole business of whistleblowing and close down a major source of information for Congress doing its constitutional job of oversight.

Could you explain to me why it is necessary for you to have access to communications between Mr. Aguirre and the committees investigating his allegations?

Mr. STACHNIK. First off, I do have a parochial interest in whistleblowers, as part of the IGs' community that depends on whistleblowers, as well as other individuals within the government, to provide information and leads for investigation, so it is not the case that we find them un-valuable.

I can tell you, in terms of this subpoena enforcement matter that you were discussing——

Senator GRASSLEY. Yes. Why do you need access to communications? I mean, you should have all this information. If you are doing your job and you are talking to whistleblowers, why do you need what they give us?

Anyway, we have made an entreaty to you to agree to avoid interfering in our investigation. If you would narrow the scope of

your subpoena to exclude his communications with our committee, it might get you the information you need and you are not interfering with any constitutional checks and balances and things of that nature. Also, you just said that you respect whistleblowers.

Mr. STACHNIK. Yes, sir.

Senator GRASSLEY. Well, then you do not seem to be respecting Mr. Aguirre very well in this whole process.

Mr. STACHNIK. I am unaware I did anything disrespectful to Mr. Aguirre.

Senator GRASSLEY. Well, I am using that as an example. Do you really have respect for whistleblowers in that respect? In other words, if you consider them of value, why do you not take the word of the whistleblower sitting beside you?

Mr. STACHNIK. Well, I am not an advocate for whistleblowers. That is not the function of the Inspector General.

Senator GRASSLEY. But you ought to be an advocate for their information that they give you.

Mr. STACHNIK. We did. That is the purpose of the investigation, was to validate the information and the allegations made by Mr. Aguirre.

Senator GRASSLEY. What are the chances of narrowing your request to Congress?

Mr. STACHNIK. I have been advised by the Department of Justice not to comment on that. I can tell you that, personally, I am not looking to make a fuss about this matter. It is up to lawyers.

Senator GRASSLEY. You may be playing footsie with an executive branch of government that wants to curb Congressional inquiries even beyond this one. That is a precedent that could be set.

Chairman Specter, I think we need to consider legislation that ensures that agencies cannot intimidate whistleblowers by issuing subpoenas to them for all of their communications with Congress. We need to ensure that people feel free to come to us with information about waste, fraud and abuse without worrying that they are going to get slapped with a subpoena.

Chairman SPECTER. Senator Grassley, there is no doubt about that. We have some of that included in the draft legislation which has been circulated, but we need to be sure that Mr. Ribelin, for example, who stepped forward and has given candid testimony, backed up by documents, will be protected. There is no doubt about that.

And the point that you are making with Mr. Stachnik is very well founded. We had not come to the point of questioning him, but he closed his investigation without questioning Mr. Aguirre, which is sort of incomprehensible.

For the Inspector General to seek the testimony, what Mr. Aguirre told the Finance Committee, what he told the Judiciary Committee, is just really extraordinary. It is just really extraordinary that our oversight and our inquiries would be subject to intimidation. I mean, that is what it is. You are getting even with Mr. Aguirre for talking to the Finance Committee and the Judiciary Committee. Is that not about the size of it, Mr. Stachnik?

Mr. STACHNIK. Not from my perspective, no. I am trying to get the information necessary to complete the reopened investigation.

Chairman SPECTER. Well, why do you not ask Mr. Aguirre? Why not ask Mr. Aguirre for what he has told the committees?

Mr. STACHNIK. We have talked to Mr. Aguirre's attorneys. My attorneys have talked to his attorneys. We will take his statement from this Committee and look at that carefully.

Chairman SPECTER. Well, any information you want from Mr. Aguirre, you can get from him. Why do you have to——

Mr. STACHNIK. We have asked Mr.——

Chairman SPECTER. Let me finish the question. Why do you have to implicate what the Judiciary Committee has heard from Mr. Aguirre?

Mr. STACHNIK. We have asked Mr. Aguirre directly for information and he has declined to give us that information.

Mr. AGUIRRE. I have to speak on that. May I?

Chairman SPECTER. Go ahead, Mr. Aguirre.

Mr. AGUIRRE. I provided them 250 pages of details, a 45-page statement backed up by 200 pages of exhibits, laying out everything. This statement that I gave them, I have given to your staff. I have never had anyone come back and say, it is not enough information for us to understand.

I do not know why they are doing this. I am not sure it is a search for information any more. I think it is something else. The information that they have got now is voluminous. Yet, we continue on.

Chairman SPECTER. Mr. Berger, do you care to make a comment? There has been some media speculation as to your joining the Debevoise firm after there was some involvement by the Debevoise firm with Morgan Stanley and Mr. Mack. I want to give you an opportunity to comment about that.

Mr. BERGER. Thank you, Senator. I appreciate the opportunity to comment on that. The first statement, is there is absolutely no correlation whatsoever between my decision to seek employment outside of the Commission and the Pequot investigation, or any investigation.

Chairman SPECTER. How long a period of time was there between your involvement in the Pequot investigation and the involvement of Mr. Mack and the representation by Debevoise and the time you sought employment with Debevoise?

Mr. BERGER. My understanding is that Debevoise represented not Mr. Mack, but the board of directors of Morgan Stanley, for 6 days in June of 2005. I first approached Debevoise in January of 2006.

Chairman SPECTER. Anything further you want to say about that?

Mr. BERGER. I think I have said everything.

Chairman SPECTER. All right.

Mr. Stachnik, are you saying, in effect, that as far as you are concerned, you do not want the communications with the committees?

Mr. STACHNIK. I have been advised by the Department of Justice not to discuss this matter. I apologize.

Chairman SPECTER. Well, they are representing you. But you are the investigator. You are the Inspector General. You are the party

in these proceedings. Do you want the information which was given to the Judiciary Committee?

Mr. STACHNIK. We need the information that would allow us to conduct the investigation.

Chairman SPECTER. Now answer my question.

Mr. STACHNIK. I am sorry. I have to go with the advice given to me by the Department of Justice and I cannot discuss the matter.

Chairman SPECTER. Well, has the Department of Justice told you that you should get the information from the Judiciary Committee?

Mr. STACHNIK. We did request the information from the Judiciary Committee. We requested it in writing, as well as orally. My understanding is, you have a Senate rule——

Chairman SPECTER. Now see if you can focus on my question.

Mr. STACHNIK. All right. I am sorry.

Chairman SPECTER. Did the Department of Justice urge you to get the information from the Judiciary Committee or is the Department of Justice not really your lawyer in the matter to proceed it in court to see if they can compel it?

The Department of Justice does not make the decision as to whether the information is necessary for your investigation, Mr. Stachnik. You make that decision.

Mr. STACHNIK. That is correct.

Chairman SPECTER. Well, so are you saying that you want that information from the Judiciary Committee?

Mr. STACHNIK. Again, Senator, the Department of Justice has advised me not to discuss the matter. I do not know anything more——

Chairman SPECTER. Oh. Now the Department of Justice has advised you not to discuss the matter with the Judiciary Committee?

Mr. STACHNIK. That is correct.

Chairman SPECTER. The plot grows thicker all the time.

Well, I think we have gone about as far as we can go here. The draft legislation which would permit the parallel activities by the Department of Justice and the SEC, and would provide greater inducements to whistleblowers and would provide for some regulation where you have small investors and you have pension funds, we are going to put that into the legislative process and introduce that legislation. Obviously nothing is going to happen in the 109th Congress, but this is going to be a matter for analysis and pursuit later.

At a minimum, it is very, very troubling what the SEC has done here, Ms. Thomsen, Mr. Berger, Mr. Kreitman, Mr. Hanson. At the very minimum, it is very, very troubling. When you have a matter referred to you and it sits dormant for 2 years, and you have a very vigorous investigator like Mr. Aguirre coming forward and you have him working from September of 2004 and getting very good reports as late as June 29, 2005, and then because he is pressing on what is admitted by your own memoranda, Mr. Hanson, to have political overtones, to have "juice", and you have one of your professionals of long standing, Mr. Ribelin, coming in and saying something is smelly, and then your agency takes no action until there is a Judiciary Committee hearing in June and you finally get around to taking Mr. Mack's deposition 5 days after the statute of limitations has run, and you have the Inspector General of the SEC

taking punitive action against Mr. Aguirre—that is what it is, Mr. Stachnik.

Senator Grassley expressed it very, very well on the kind of an investigation you have run here, which is not professional. You are not the only one who knows something about running investigations.

But we are not finished with this yet, ladies and gentlemen. We are not finished with this. We have people under oath with directly contradictory testimony. It is very, very troubling, at a minimum.

That concludes the hearing.

[Whereupon, at 12:03 p.m. the hearing was concluded.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

GARY J. AGUIRRE

January 26, 2007

Re: Responses to Supplemental Questions.

Nikole Burroughs
Hearing Clerk
United States Senate
Committee on the Judiciary
222 Senate Dirksen Building

Dear Ms. Burroughs:

I was a witness at the December 5, 2006, hearing on Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity. Following the hearing, your predecessor, Barr Huefner, forwarded supplemental questions from Senator Grassley and from the former Judiciary Committee Chairman, Senator Specter. Mr. Huefner extended my response period through February 1, 2007.

I am responding to those supplemental questions with the following enclosures:

1) My responses to Senator Grassley's supplemental questions;

2) My responses to Senator Specter's supplemental questions; and

3) A three-ring binder containing supporting exhibits 1 through 150, and exhibits A through H.

I am also enclosing a copy of the December 5, 2006, transcript with one correction. Although that correction is not to my testimony, I believe it is relevant because it shows a material change in the witness's testimony, a change which I believe is false.

Sincerely,

Gary J. Aguirre

PHONE [redacted] FAX [redacted] EMAIL [redacted]

Judiciary Committee Hearing: Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?
Responses by Gary Aguirre for the Hearing Record
to Questions from Senator Grassley:

For Mr. Gary Aguirre
Former Senior Attorney
U.S Securities and Exchange Commission

(1) At the Judiciary Hearing, your former supervisors from the SEC had a lot of negative things to say about you and your performance while employed as a Senior Attorney at the SEC. For instance, your Branch Chief, Robert Hanson said you were disrespectful and abusive to other attorneys, you misrepresented Commission policy to outside counsel, and that your files were disorganized and incomprehensible.

These complaints can be summed up in the following list. Please provide a detailed response (including relevant documents where available) to the following allegations that were presented against you at the December 5, 2006, hearing.

I appreciate the opportunity to respond to each of the false and groundless accusations by Linda Thomsen (Thomsen), Paul Berger (Berger), Mark Kreitman (Kreitman) and Robert Hanson (Hanson) attacking my performance as an SEC attorney. The purpose and available time at the December 5, 2006, hearing permitted only the briefest response to these accusations.[1]

Thomsen, Berger, Kreitman, and Hanson (collectively "the Four") employed a classic strategy to obfuscate their misdeeds—an *ad hominem* attack on the messenger. It took two different forms. Much of their attack was pure fiction. No contemporaneous documents support any of these factual allegations for a simple reason: they did not happen. But the Four also sprinkled in a few half truths. These accusations fictionalize real events. The part that is true finds support in contemporaneous documents, but those same documents refute the part that is fiction.

The Four spent much time wrapping themselves in the SEC flag, as if this mantle would somehow give their testimony the appearance of truth. But it would fail them. Their evasive answers, half truths and flat lies only proved your Committee would have to look elsewhere for the truth. Their testimony brought no honor to an agency whose mission—to protect investors and maintain the integrity of the capital markets—demands that its leadership be forthright. In truth, they were just four individuals who had abused the power entrusted to them under law, four individuals willing to say anything—true or false—to conceal their abuse of power, four individuals willing to cross the line marking the boundary of perjury.

[1] "I have not seen a single piece of paper backing anything that they have said through my history with the SEC, and I have been trying to get them through FOIA and Privacy Acts." *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006), Court reporter hearing transcript (Hereinafter "Hearing RT") p. 36, l. 23 through p. 37, l. 1.

The Four's personal attacks share a common feature, which undermines their credibility. None found its way into any performance evaluation—that is until I questioned Mack's special treatment. Until then, every link in my chain of command found my performance warranted a two-step merit pay raise. On June 1, 2005, Kreitman certified my job performance satisfied every applicable SEC standard.[2] On June 29, Hanson forwarded his evaluation of my performance stating that I made "contributions of high quality" and that I "went the extra mile and then some."[3] On July 18, the compensation committee, with Berger as a member, decided my performance warranted a two-step merit increase. By July 27, Thomsen had reviewed and approved my two-step increase.

But all this would quickly change in late July 2005 when I spoke to Berger about Mack's favored treatment and followed up on July 27 with my email saying the same.[4] Less than three days later, Berger, Kreitman and Hanson decided to reevaluate my 2004-2005 performance.[5] Their "reevaluation" described someone who clearly had no future at the SEC.[6] One month later, the Four carried out the "reevaluation" by terminating my employment.[7]

So how did the Four try to reconcile their uniformly positive evaluations of my performance with their decision to fire me? This assignment went to Kreitman; he took two bites at this apple. His first theory employed this syllogism: Aguirre's performance failures with one exception (my judgment failure in seeking to subpoena Mack) were all conduct-related; the SEC formal evaluation process did not concern itself with an employee's conduct, only his professional judgments; therefore, Aguirre got through the evaluation process with his two-step merit pay increase.[8] The syllogism fails if either of its premises is false. In this case, both premises are false.

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[2] See SEC Form 2494, Ex. 1.

[3] See Robert Hanson's June 2005 evaluation of Gary Aguirre's performance and transmittal sheet, Ex. 2.

[4] See July 27, 2005, email from Aguirre to Berger and Kreitman, Ex. 59.

[5] Hearing RT, p. 53, l. 19 through p. 54, l. 4; and *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Mark Kreitman, Assistant Director Division of Enforcement U.S. Securities and Exchange Commission Washington, D.C.). (Hereinafter "Kreitman's Written Testimony").

[6] See August 1, 2005, "reevaluation" of Gary Aguirre, Ex. 95.

[7] See September 1, 2005, termination notice, Ex. 96.

[8] This first theory emerged during questioning by Senator Specter of Kreitman. The transcript reads:

> Chairman Specter. Well, what was the change that moved from "acceptable" in all categories to "unacceptable"?...and where Mr. Hanson says his immediate supervisor, "Made Contributions of High Quality". Suddenly there is a change and he is fired?

Hearing RT, p. 92, ll. 1-11.

> Mr. Kreitman. Senator, the only respect in which Mr. Aguirre's professional judgment received disfavor by any of his supervisors was, as Mr. Berger indicated, with respect to the timing of the testimony of Mr. Mack.
>
> However, it was Mr. Aguirre's behavior and conduct, the contemptuous way in which he treated his colleagues, the unprofessional way he dealt with opposing counsel, his refusal to accept any kind of directional supervision, that led to his termination.

Hearing RT, p. 92, ll. 12-20.

The first premise was express: that my alleged deficiencies were all conduct related with one exception.[9] That factual theory cannot be squared with the Four's testimony before you Committee. Collectively, the Four testified my performance was deficient in twenty-three particulars. Their accusations were not limited to conduct-related deficiencies. The Four disparaged every aspect of my substantive work: to communicate with other staff,[10] to plan and organize an investigation,[11] to correctly issue a subpoena,[12] to use the subpoena power reasonably,[13] to distinguish speculation from fact,[14] to weigh evidence,[15] to take testimony,[16] to understand Commission policy,[17] and to record and document the investigative progress.[18] All of these allegations involve professional judgment, which according to Kreitman should have been tagged during the evaluation process. Yet, the Four's evaluations of my performance omitted any mention of these flaws. Once again, the key question, the one Senator Specter posed to Kreitman, still searches for an answer: why did none of my alleged deficiencies appear on any of my evaluations?

Kreitman's second premise—that the evaluation process tracks professional competence but not conduct-related deficiencies—is equally flawed. Indeed, it is absurd. It suggests the SEC could be in the process of firing someone for accepting a bribe, while awarding the miscreant a three-step pay increase so long as his work product was superior.

The SEC's evaluation process is not so flawed. It clearly encompasses conduct. In this regard, Kreitman certified on SEC Form 2494 that my "oral and written communications further agency objectives and, with few exceptions, are ...appropriate for the intended audience." He also certified that my "required personal interactions with internal and external constituencies/counterparts are generally responsive to the needs of these individuals or entities."[19] How could my interactions with others—both "internal and external"—be "appropriate" and "generally responsive" to their "needs," as Kreitman has certified,[20] if, I had hung up on opposing counsel, abused fellow staff attorneys, refused to share information, thrown tantrums or engaged in any of the other alleged misconduct, as Kreitman now testifies?[21] So which is true: Kreitman's certification on June 1, 2005, when his job demanded an honest assessment, or his testimony on December 5, 2005, when his own conduct was under scrutiny?

As a fallback, Kreitman tried to peddle a second theory—that my behavior fell off after April 30, 2005. He put it this way:

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[9] The one "professional judgment" which received my supervisors' disfavor, according to Kreitman, was decision to issue a subpoena to John Mack. *Id.*, ll. 12-15.

[10] Aguirre "has difficulty explaining the significance of evidence in a linear fashion."

[11] Aguirre's "PCM investigation was poorly thought out [and] disorganized."

[12] Aguirre "sent out several subpoenas violated privacy law."

[13] Aguirre "sent out too many subpoenas" and he "subpoenaed too many emails, over 19 million."

[14] Aguirre "made factual statements that turned out to be mere speculation."

[15] Aguirre was "unable to fairly and impartially balance evidence."

[16] Aguirre "was disorganized and unprofessional during Samberg's June testimony."

[17] Aguirre "misrepresented Commission policy to opposing counsel."

[18] "Aguirre's records and files were disorganized and sloppy."

[19] See SEC form 2494, Ex. 1.

[20] *Id.*

[21] Kreitman's Written Testimony.

> I've heard—and read—a good deal about the two step increase we recommended for Mr. Aguirre which became effective shortly before his termination. That recommendation covered the rating period that ended April 30, some four months prior...Mr. Aguirre's *subsequent* behavior however so far exceeded the bounds of acceptable professional conduct that it was incumbent on me and his other super-visors (sic) to supplement his overly generous evaluation. A copy of our supplemental evaluation, prepared on August 1, 2005, which accurately described concerns we had about Mr. Aguirre's conduct, is attached (emphasis added).[22]

But this *factual* theory (Aguirre's *subsequent* behavior fell off) clashes with the *factual* theory stated in the SEC's official termination notice. The notice suggests that my conduct was sub par from the outset, but improved towards the end. It reads: "Since those meetings, your conduct has not improved to the level that warrants retention beyond your trial period."[23] So again, which is it? Was my performance solid for most of the year, but fell off at the end? Or was my performance sub par for most of the year, but my *improvement* inadequate at the end? The SEC has offered your Committee both conflicting theories. Neither is true.

The truth may be stated simply. My evaluations were all positive until I questioned the Four's decision to give Mack special treatment. Then within three days, three of the Four rewrote my employment history with their phony "reevaluation," a process otherwise unknown at the SEC.[24] That "reevaluation" was never shown to me.[25] It never found its way into my personnel file. No one ever discussed it with me. All of this violates established SEC protocol.

But the Four's handling of my performance evaluations is just one fact that undermines their credibility. My supervisors never mentioned any of the twenty-three alleged deficiencies in any written or oral communication to me. Nor has any email surfaced—to the best of my knowledge—in which my supervisors mention any of these alleged deficiencies. Few appear in my termination notice, even though the law required the SEC to state them there.[26]

No evidence links my performance to my firing because it was not the cause. The Four fired me because I questioned their decision to give Mack special treatment. When two Senate committees put the high beam on that decision, the SEC reopened the Mack investigation. But the Four also handled the reopened investigation; it was therefore just as much a sham as its closing a year earlier.

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[22] *Id.*

[23] See termination notice, Ex. 96.

[24] Hearing RT, p. 86, l. 20 through p. 89, l. 1.

[25] *Id.*, p. 89, l. 2 through p. 90, l. 5.

[26] See termination notice, Ex. 96. Section 315.804(a) of Title 5 provides:

> When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

The Four's mentality in conducting the reopened investigation was best expressed by Hanson during questioning by Senator Specter. Hanson well understood that other staff and I believed that Mack may have learned about the pending merger during his negotiations with Credit Suisse (CS) or Credit Suisse First Boston (CSFB) in late June and then passed that tip along to Samberg during a phone call on June 29. During questioning by Senator Specter, Hanson *flatly* denied Mack met with CSFB employees in late June 2001,[27] contrary to information a CSFB attorney had provided to me.[28] But Hanson's answers whether Mack met with Credit Suisse executives in late June 2001 were evasive. Still, his responses impliedly conceded that Mack had met with Credit Suisse executives at the critical time.[29] On this point, the transcript reads:

> Mr. Aguirre. And I think, more importantly, the question is, what did Mr. Mack say about his meetings with Credit Suisse during the 27, 28 and 29 of June?...
>
> Chairman Specter. Was Mr. Mack questioned about that, Mr. Hanson?
>
> Mr. Hanson. Of course.
>
> Chairman Specter. And what did he say?
>
> Mr. Hanson. That the information that Mr. Aguirre alleged or speculated that Mr. Mack may have had was so far down in the weeds for Mr. Mack.[30]

The only reason that Mack would have discussed what was said during meetings in late June 2001 with Credit Suisse is if they had in fact taken place. Hanson's reference to what "Mr. Aguirre alleged or speculated" was of course reference to my and other staff's belief that Mack may have learned about GE's pending acquisition of Heller during these meetings.

Then this remarkable exchange took place:

> Chairman Specter. So far down in the weeds?
>
> Mr. Hanson. It was so far removed from what he was doing with respect to negotiating with CS First Boston *that it had no relevance to him* (emphasis added)...[31]

A little perspective on Hanson's comment may be helpful. The SEC never took the testimony of the Credit Suisse officials that met with Mack in late June 2001,[32] just before he

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[27] Hearing RT, p. 80, l. 15-19.
[28] *Id.*, p. 80, l. 22 to p. 81, l. 1.
[29] *Id.*, p. 82, ll. 10-12.
[30] *Id.*, p. 82, l. 1-12.
[31] *Id.* p. 82, ll. 13-20. Hanson Not only that, but the people from CS First Boston that we talked to and received the e-mails from said that there is no possible way that they had the information, let alone passed it on to Mr. Mack.
[32] The SEC's Case Closing Recommendation, Ex. 115, only states that the SEC took the testimony of the CSFB employees who, according to Hanson, did not meet with Mack in late June 2001.

spoke with Samberg on June 29. The critical statute of limitations had already expired by the time the SEC learned of those meetings during Mack's testimony. But had the SEC questioned the Credit Suisse executives who met with Mack and had those executives testified that the pending acquisition was discussed during their meetings with Mack, Hanson had a ready answer. It was "so far down in the weeds" that it would have "had no relevance to [Mack]." The relevance to Mack was of course not the issue. *What about the relevance to Hanson?*

I submit that such a disclosure by Credit Suisse executives to Mack in late June would have had considerable relevance to any government investigator conducting a legitimate investigation of Pequot Capital Management's (PCM) trading in GE and Heller. Had Mack learned about the pending acquisition on June 27 or 28, the time period covered by Senator Specter's question to Hanson, Mack would have known that fact on June 29 when he spoke with Samberg. Samberg's heavy trading of Heller on the next trading day would be circumstantial evidence that Mack communicated the tip to him.[33] It would explain why PCM arranged for Mack to get a $5 million piece of Fresh Start, which tripled in value eight months after Mack put up his cash.[34]

Further, this piece of information—whether Mack learned about the pending acquisition during his meetings with CS or CSFB—was the "prerequisite" to take his testimony, according to Kreitman. Yet, even if I had found some way to establish this fact to Kreitman's satisfaction, it would still have "had no relevance" to Mack, according to Hanson, and therefore apparently none to Hanson either. I submit these are not the words of an investigator conducting a real investigation. Rather, they are the words of someone so caught up in a cover up that he fails to recognize the absurdity of his own words.

I now turn to the specific attacks on my performance.

Mark Kreitman

1) **Mr. Aguirre refused to share with them [SEC colleagues] details, strategy or tactics about the investigation.**

As Kreitman must know, his testimony was false. I freely told my supervisors and other staff of evidentiary developments, as well as my views on new tactics or strategies to advance the PCM investigation. This was done through emails, team conferences, smaller meetings, and phone calls. I have included typical emails recording this practice from my first month to my last month with the SEC.[35] None of my supervisors ever suggested or implied that I kept

[33] United States v. Larrabee, 240 F.3d 18, 21 (1st Cir. 2001).

[34] See Aguirre written testimony, footnote 116.

[35] For example, see the following emails: See September 22, 2004, email from Aguirre to Cain, Ex. 3; October 6, 2004, email from Aguirre to Cain, Ex. 4; October 8, 2004, email from Aguirre to Grime and Cain, Ex. 5; October 13, 2004, email from Aguirre to Cain, Ex. 6; October 14, 2004, email from Aguirre to Grime and Cain, Ex. 7; November 3, 2004, email from Aguirre to Grime, Cain and Foster, Ex. 8; December 6, 2004, from Aguirre to Foster, Ex. 9; December 8, 2004, email from Foster to Aguirre, Ex. 10; December 9, 2004, email from Aguirre to Foster, Ex. 11; December 10, 2004, email from Aguirre to Foster, Ex. 12; January 10, 2005, email from Aguirre to Grime and Cain, Ex. 13; January 10, 2005, email from Aguirre to Cain, Ex. 14; January 24, 2005, email from Aguirre to Kreitman, Ex. 15; January 25, 2005, email from Aguirre to Hanson, Ex. 16; February 3, 2005, email from Kreitman

investigative developments to myself. Nor has the SEC pointed to a scrap of paper to support this theory.

I updated Hanson and, when appropriate or requested, Kreitman on all developments of the PCM investigation. Shortly after my transfer to Kreitman's group and Hanson's branch, I updated both on the investigative plan, which Kreitman thought was just fine.[36] As discussed below, I updated them on revisions to the plan and proposed new strategies and tactics from time to time as they occurred.[37] Again, from the outset, I passed along to my supervisors significant input from staff assigned to the PCM investigation by other SEC offices or divisions.[38] I also notified both Hanson and Kreitman of the initial examination schedule[39] and other significant decisions regarding the issuance of subpoenas.[40]

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to Hanson and Aguirre, Ex. 18; February 4, 2005, email from Aguirre to Kreitman, Ex. 19; February 8, 2005, email from Aguirre to Kreitman and Hanson, Ex. 20; February 14, 2005, email from Kreitman to Hanson and Aguirre, Ex. 21; February 16, 2005, email from Hanson to Aguirre, Ex. 22; February 16, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Ivarone, Plimpton, and Snively, Ex. 23; February 18, 2005, email from Aguirre to Hanson, Ex. 24; February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 25; February 22, 2005, email from Aguirre to Hanson, Kreitman, Foster, and Ribelin, Ex. 26; February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin and Aguirre, Ex. 27; February 25, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 28; March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29; March 9, 2005, email from Aguirre to Hanson and Kreitman, Ex. 30; March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson, Ex. 31; March 15, 2005, email from Aguirre to Hanson, Kreitman, Ribelin, Conroy, Glascoe, and Foster, Ex. 32; March 16, 2005, email from Aguirre to Hanson, Foster, Ribelin, Conroy, Ivarone, and Plimpton, Ex. 33; March 16, 2005, email from Aguirre to Kreitman, Hanson, Plimpton, Ivartone, Foster, Conroy and Ribelin, Ex. 34; March 18, 2005, email from Aguirre to Hanson and Kreitman; Ex. 35; March 29, 2005, email from Aguirre to Hanson and Ribelin, Ex. 36; April 13, 2005, email from Aguirre to Hanson, Ex. 37; April 18, 2005, email from Aguirre to Hanson, Ex. 38; April 22, 2005, email from Aguirre to Hanson and Kreitman, Ex. 39; April 29, 2005, email from Aguirre to Hanson, Ex. 40; May 6, 2005, email from Aguirre to Hanson, Ex. 41; May 9, 2005, email from Aguirre to Florschutz, Kreitman and Hanson, Ex. 42; May 10, 2005, email from Aguirre to Kreitman and Hanson, Ex. 43; May 18, 2005, email from Aguirre to Hanson, Ex. 44; May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Eichner and Conroy, Ex. 45; May 24, 2005, email from Aguirre to Hanson, Foster, Ribelin, Eichner, O'Rourke, Ivarone and Kreitman, Ex. 46; May 24, 2005, email from Aguirre to Hanson, Ex. 47; May 25, 2005, email from Aguirre to Hanson, Ex. 48; June 3, 2005, email from Aguirre to Ribelin, Foster, Eichner, Conroy, Glascoe, Miller, Hanson and Kreitman, Ex. 49; June 2, 2005, email from Aguirre to Kreitman, Ex. 50; June 12, 2005, email from Aguirre to Hanson, Ex. 51; June 10, 2005, email from Aguirre to Ribelin, Hilton, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke, Ex. 52; June 12, 2005, email from Aguirre to Hanson, Ex. 53; June 20, 2005, email from Aguirre to Hanson, Ex. 54; June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 55; June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin, Ex. 56; June 29, 2005, email from Aguirre to Kreitman, Ex. 57; July 29, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Eichner and Jama, Ex. 58; July 27, 2005, email from Aguirre to Berger and Kreitman, Ex. 59; August 24, 2005, email from Aguirre to Berger; and August 4, 2005, email from Aguirre to Hanson, Ex. 60.

[36] See February 2, 2005, email from Aguirre to Kreitman and Hanson at 5:16 pm, Ex. 18; and February 3, 2005, email from Kreitman to Aguirre and Hanson at 12:44 pm, Ex. 18.

[37] See, for example, March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29.

[38] See for example February 8, 2005, email from Aguirre forwarding to Kreitman and Hanson an email from Snively of OCIE, Ex. 20, and February 23, 2005, email chain between Aguirre, Kreitman Hanson, Foster and Ribelin, Ex. 27.

[39] See February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 24.

[40] April 11, 2005, email from Aguirre to Hanson, Ex. 38; May 24, 2005, email from Aguirre to Hanson, Ex. 47; February 14, 2005, email from Aguirre to Foster, Ex. 82; Early May email chain between Kreitman, Hanson and Aguirre, Ex. 89; May 4, 2005, email from Ribelin to Hanson and Kreitman, 103; August 26, 2005, email from Aguirre to Kreitman, Hanson, Eichner, Ribelin, and Jama, Ex. 119; May 24, 2005, email exchange between Aguirre and Hanson, Ex. 124; Chain of emails in late August 2005, Ex. 133; June 2, 2005, email from Aguirre to Kreitman

I also notified both Kreitman and Hanson of the first PCM staff meeting, after my transfer to Kreitman's group, which included staff from other SEC divisions or offices.[41] The email to Kreitman and Hanson incorporated my email to other staff setting up the meeting and its proposed agenda. It read:

> Pequot Team:
>
> We are entering a critical stage of this investigation in March, when we take the examinations of the Pequot execs who made the trading decisions that are the subject of this investigation, as well as some of the issuers employees suspected of being tippers. So that we can discuss what needs to be done between now and then, I have reserved Room 8120 for Wednesday at 2:15 pm.
>
> Here are some of the matters we need to discuss:
> 1) Getting incoming CDs with email and other electronic data on Iconnect or the J-Drive;
> 2) Searching through the trading data for individuals who may have been trading in parallel with Pequot;
> 3) Getting the telephone records organized for quick and easy access;
> 4) One of Eric favorites: could Boston office conduct exam of Pequot to force them to cough e-mails and other records?
> 5) Andy: Have you been able to tweak your software to adjust to the Pequot trading profile?
> 6) Reviewing emails: all help appreciated. Tom has been looking at Blue Coat
>
> I will circulate a more complete agenda before the meeting.
>
> Look forward to seeing all of you.[42]

Kreitman delegated the matter to Hanson and Hanson authorized me to handle the meeting without his presence.[43]

With this history likely in mind, on June 1, 2005, Kreitman certified my performance met the following standards:

> **Communication**—oral and written communications, further agency objectives, and, with few exceptions, are clear, concise, well-organized, accurate, grammatically correct, and appropriate for the intended audience. Required personal interactions with internal and external constituencies/counterparts are generally responsive to the needs of these individuals or entities. Keeps these

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Ex. 140; June 3, 2005, email from Aguirre to Hanson, Ex. 141; June 3, 2005, email from Eichner to Kreitman, Hanson, and Aguirre, Ex. 142; June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre, Ex. 143; August 24, 2005, email from Kreitman, to Aguirre and Hanson, Ex. 145. See also supplement to this footnote.

[41] February 14, 2005, email from Aguirre to Kreitman and Hanson, Ex. 21.

[42] February 14, 2005, email from Aguirre to Kreitman and Hanson, Ex. 21.

[43] *Id.* See also Hanson's February 16, 2005, email to Aguirre, Ex. 22.

> entities and management appraised or relevant issues, changes, and problems as directed.[44]

Nor was there ever a complaint that I was withholding any information from anyone. Indeed, if true, this charge could be easily proved. Emails to me inquiring how the Samberg testimony went, whether there was a viable legal theory supporting the wash trades violations or any of a hundred other subjects could be matched with my failure or refusal to reply. But there is no such evidence. Instead, Kreitman—an official whose job is to enforce truth in our capital markets—tells another lie as a strand in a larger web.

2) The investigation was poorly thought out, disorganized and sloppily documented.

This allegation disparages my work product on the PCM investigation for my entire tenure with the SEC.[45] It once again raises the obvious question why was this alleged deficiency not reflected in any of my evaluations, the "reevaluation," or even in the termination notice? How did it go undetected until the two Senate committees began their investigation?

To begin with, this accusation overlooks the fact that I did not create the investigative plan by myself. The plan, its revisions and its organization were the subject of numerous emails to my supervisors throughout the year.[46] It incorporated input from other staff members with varied expertise.

To begin with, in October 2004, Grime and Cain instructed me to develop the investigative plan with Foster, who had almost thirty years experience as an Enforcement investigator at that time. Grime's and Cain's decision followed my email of October 8, 2004, which read in part as follows:

> At yesterday's training session, Laura Joseph [she directed Enforcement training at that time] introduced Hilton Foster as the most knowledgeable person on insider trading at Commission. He lived up to his billing. I discussed the Pequot case with him yesterday afternoon. Cutting to the chase: he considers Arthur Samburg and Pequot to be "serial inside traders." He tried to make a case against them a decade ago, but failed. He says our case will be extremely difficult, but it must be brought. He has agreed to work with me on the case, subject to your approval.[47]

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[44] See the SEC form 2494, Ex. 1.

[45] The document organization is discussed below in response to a separate Committee question. See *infra*, Hanson's allegation 4, p. 42-43.

[46] See September 22, 2004, email from Aguirre to Cain, Ex. 3; November 3, 2004, email from Aguirre to Grime, Cain and Foster, Ex. 8; February 3, 2005, email from Aguirre to Hanson and Kreitman at 10:00 am, Ex. 18; March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 85; the April 22, 2005, chain of emails between Aguirre Hanson and Kreitman, Ex. 39; the June 20, 2005, chain of emails between Hanson and Aguirre, Ex. 54; June 28, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 56; and August 4, 2005, email from Aguirre to Hanson, Ex. 60.

[47] See October 8, 2004, email from Aguirre to Richard Grime and Cain, Ex. 5.

My October 14, 2004, email to Grime and Cain ("First cut at Pequot Investigation Outline") confirmed Foster's participation in the development of the investigative plan:

> The attached is a work in progress and is only intended as a general overview. I have not as yet asked Hilton Foster for his input. When approved, as is or as modified, I will schedule a meeting with Hilton, to include Charles if he wishes. I will then begin to work on the subpoenas, chrono requests, and name recognition letters, which I would expect to all go out at about the same time.[48]

The meeting mentioned in the above email took place on November 3, 2004, among Foster, Grime, Cain and me. My email to the meeting participants confirmed the consensus reached at that meeting regarding the short term investigative plan.[49]

During the period that the original investigative plan was developed, from October through early February, Foster and I had exchanged over 150 emails relating to the PCM investigation.[50] We had countless one-on-one meetings to discuss how to conduct the investigation. Foster was present and participated in the examinations of all witnesses. He continued to actively participate in the investigation until he left the commission on June 30, 2005.

But Foster was not the only staff person whose guidance I sought and obtained in formulating the investigative plan. By the time I presented the plan to Kreitman and Hanson, I was getting almost daily input on the PCM investigation from Ribelin,[51] a branch chief with Market Surveillance, who had seventeen years experience with the SEC Enforcement Division. Additionally, as discussed below, I had sought and obtained input from staff with special expertise from multiple offices and divisions of the SEC.[52]

I first presented the investigative plan to Kreitman and Hanson by my email of February 2, 2005, shortly after my transfer to Kreitman's group and Hanson's branch.[53] Kreitman's response offered no hint that the plan was "poorly thought out." Instead, his email read: "Gary – All this looks good."[54]

That plan encountered an impasse in the spring of 2005, when PCM's attorneys failed to comply with the SEC subpoenas and earlier written requests for information.[55] Accordingly, with

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[48] See October 14, 2004, email from Aguirre to Grime and Cain, Ex 7.

[49] See November 3, 2004, email from Aguirre to Grime, Cain and Hilton Foster, Ex.8.

[50] See for example, Exhibits 8 through12. See also the supplement to this footnote.

[51] Regarding Ribelin's participation in the investigation, see, for example, the December 2, 2004, email from Ribelin to David Wiederkehr, Stephen Glascoe, and Aguirre, Ex. 61; and December 7, 2004, email from Ribelin to Joseph Cella, Foster, Glascoe, and Aguirre Ex. 63. See also supplement to this footnote.

[52] See *infra*, Hanson's allegation 2, pp. 26-27.

[53] See February 2, 2005, email from Aguirre to Kreitman and Hanson, Ex. 18.

[54] See February 3, 2005, email from Kreitman, to Aguirre and Hanson, Ex 18.

[55] See February 27, 2005, email from Kreitman to Hanson, Ribelin, and Aguirre; Ex. 66. See February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin, and Aguirre, Ex. 67.

my supervisors' approval, I revised the plan several times in the spring of 2005 to overcome the lack of cooperation by PCM's attorneys.[56]

In early May, I proposed another strategy to get the relevant PCM emails. It developed out of a letter from PCM's counsel.[57] I circulated an email summarizing the proposed objectives for the strategy and refined it with my supervisors.[58] When it succeeded, Kreitman circulated an email on May 25, 2005, to Berger, Hanson, Ribelin, Foster, James Eichner (Eichner), Thomas Conroy, and me, which read: "Sounds like Gary's strategy outsmarted (or terrified) Audrey and is resulting in real progress. Excellent!"[59] I believe Hanson had this strategy in mind when he wrote in his June 29 evaluation of my performance: "He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation."[60]

On June 14, 2005, Hanson and Kreitman again recognized that my investigative plan was working. On that day, I presented them with evidence suggesting that PCM had traded on illegal tips when it made an $18 million profit on its trading in the common stocks of General Electric and Heller Financial. I also showed Hanson and Kreitman incriminating emails, which I had found, to and from PCM's CEO relating to Microsoft at time when the CEO made a $12 million profit trading Microsoft options. Following that presentation, Kreitman gave me his "Perry Mason" award and both Kreitman and Hanson authorized me to make the same presentation to FBI special agents and an Assistant US Attorney the next day. After the meeting with the US Attorney and the FBI, both would open their own investigations.

That step would satisfy a Kreitman objective for the PCM investigation which he set in February 2005. On February 22, 2005, Kreitman circulated an email to staff working on the PCM investigation in which he stated that "interesting" the US Attorney's office for the Southern District of New York in the PCM insider trading investigation was a "very high priority."[61]

Kreitman's written testimony that the investigation was poorly planned and organized cannot be reconciled with his own evaluation of my performance on June 1, 2005. Both Hanson and Kreitman knew about the investigative plan, since it had been presented to them by my email of February 3, 2005.[62] Both knew that its short term focus on obtaining emails had been successful.[63] Logically, Kreitman would have had these events in mind when he certified my performance met the following standards:

> **Planning and Organizing Work**—With few exceptions recognizes and solves problems, meets objectives and considers priorities when planning work

[56] See March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29; March 9, 2005, email from Aguirre to Hanson and Kreitman, Ex. 30; March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson, Ex. 31; April 11, 2005, email from Aguirre to Hanson, Ex 38, May 1, and May 2, 2005, email exchange between Kreitman and Aguirre, Ex 89; and May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, James Eichner and Conroy, Ex 45.

[57] See email chain ending with May 2, 2005, email from Kreitman to Aguirre and Hanson, Ex. 89.

[58] See May 10, 2005, email chain between Kreitman, Hanson, Eichner and Aguirre, Ex. 43.

[59] See May 20, 2005, email from Kreitman to Berger, Hanson, Ribelin, Foster, Eichner, Conroy, and Aguirre, Ex. 45.

[60] See Robert Hanson's undated evaluation of Gary Aguirre's work, Ex. 2.

[61] See February 22, 2005 email from Kreitman to Foster, Ribelin, Hanson, and Aguirre, Ex. 97.

[62] See February 3, 2005, email from Aguirre to Kreitman, Ex. 18.

[63] May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, James Eichner and Conroy, Ex. 45.

> assignments. Efficiently uses time and resources to produce a quality product with appropriate guidance and completes assignments within agreed upon timeframes.
>
> **Execution of Duties**—With few exceptions thoroughly and carefully analyzes and researches assignment. Effectively applies necessary knowledge and technical skills in order to perform duties of the position in an acceptable manner. Final work products meet established need, reflect appropriate attention to detail, and are well organized.[64]

Likewise, Kreitman's testimony cannot be reconciled with Hanson's June 29 evaluation of my work. It read in part as follows:

> [Gary's] efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance, Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has gone the extra mile, and then some.[65]

How could this progress occur with an investigation that was so poorly thought out and organized?

Further, Kreitman's written testimony on this point cannot be squared with his testimony at the hearing. When questioned by Senator Specter, Kreitman testified: "Senator, the only respect in which Mr. Aguirre's professional judgment received disfavor by any of his supervisors was, as Mr. Berger indicated, with respect to the timing of the testimony of Mr. Mack."[66] This means my planning and organization of the PCM investigation, which clearly involved "professional judgment," did not receive the "disfavor" of my supervisors. Yet, according to Kreitman, both "were poorly thought out." Both statements cannot be true.

This allegation also has no roots in any evidence. The Four cited no supporting evidence in their testimony, other than Kreitman's reference to the "reevaluation." The SEC produced none in response to my FOIA and Privacy Act requests. The Four also forgot to mention this alleged deficiency in the termination notice, which they prepared.[67] Again, federal regulations required the SEC to state the reasons for its decision in that notice.[68] The only statement in the termination notice remotely relevant to this subject read: "While your substantive work generally has been good, the problems that have occurred in other areas..."[69]

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[64] See SEC form 2494, Ex. 1.
[65] See Robert Hanson's undated evaluation of Gary Aguirre's work, Ex. 2.
[66] Hearing RT, p. 92, ll. 12-15.
[67] See termination notice, Ex. 96.
[68] 5 C.F.R. § 315.804(a).
[69] See termination notice, Ex. 96.

3) Mr. Aguirre was unable to fairly and impartially balance evidence.

This is another broad attack on both my work product and my professional integrity. If true, it describes a flaw that would have existed from my first day at the SEC. It is a disability that would have affected my work for my entire professional life. How could anyone conduct any investigation or have had even modest success as a trial attorney if he was "unable to fairly and impartially balance evidence"?

Once again, no SEC evaluation hints that my supervisors held this view during my employment, not even the "reevaluation." Nor does this allegation find support in the termination notice, which only states that my substantive work was generally good.[70] The SEC has pointed to no supporting emails or other documents. To the contrary, my supervisor's conclusion that I made "contributions of high quality" implies that I was able to "balance the evidence."[71] Likewise, Kreitman's oral testimony—that I had only one failure of professional judgment—would seem to contradict this allegation.[72] The inability to balance the evidence, if true, should have affected many of my "professional judgments." Certainly, Kreitman's June 1, 2005, certification that I possessed all of the essential skills for my job refutes this allegation. In addition, I believe my response to Kreitman allegation 2 is equally applicable to this one.

4) Mr. Aguirre refused to write up results of investigation.

With this accusation, the Four crossed the perjury line. They did not merely espouse a baseless opinion or use vague hyperbole to describe my character and performance. The Four testified to a false statement of a material and concrete fact.

Once again, there is not a scrap of paper supporting this accusation. No one even thought to include this allegation in the Berger-Kreitman-Hanson phony "reevaluation,"[73] by itself a startling omission. Why would not Hanson, Kreitman, or Berger think to mention it there if it were true?

Even more extraordinary, the Four failed to mention this alleged fact in their termination notice. Further, it could have been easily stated in that notice with language like this: "Even worse, the employee refused to write up his investigation." Instead, that notice—initialed by Berger himself—belies his sworn testimony to your Committee. On this point, the notice reads: "and [you] indicated that you were uninterested in the preparation of your primary case assignment *beyond its investigatory stage* (emphasis added), which, incidentally, was also false."[74] That investigatory phase includes by definition whatever write ups are necessary to

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[70] *Id.*

[71] Robert Hanson's June 2005 evaluation of Gary Aguirre's performance and transmittal sheet, Ex. 2.

[72] Hearing RT p. 92, ll. 12-15.

[73] See August 1, 2005, "reevaluation" of Gary Aguirre, Ex. 95.

[74] Incidentally, the statement that I told Berger or anyone that I was "uninterested" in the preparation of the case beyond its investigatory stage—is also false. My complaint to the Office of Special Counsel, previously provided to the Committee, accurately summarized my conversation with Berger on this point:

> Later on June 29, after the meeting with Kreitman, Complainant asked Associate Director Berger if it was ever necessary for senior staff to consider the political consequences of their decisions in

complete it, e.g., a closing memorandum, formal action memorandum. It would be superseded, if at all, when the Trial Unit stepped in to file an administrative proceeding or civil lawsuit.

The evidentiary support for this accusation comes to this: each SEC official telling this lie could point to three others doing the same. Whether the lie has one author or several, it is still the same: a lie.

5) The supplemental "reevaluation" accurately described concerns about Gary's conduct.

The issues raised by the "reevaluation" are specifically addressed in response to other specific Committee questions with the exception of the two below.

a) He drew complaints from opposing counsel ... which raises a question because of their frequency and consistency.

I was dealing with more than fifty defense attorneys and had more than a thousand phone contacts plus several hundred written communications. I know of only three attorneys who contacted my superiors or expressed a desire to do so. One attorney questioned my decision that her clients should come to Washington, DC, for their examinations. Both Hanson and Kreitman agreed with my decision.[75] The second involved a corporate attorney who was displeased when I issued a second subpoena to his client, GE Capital. The attorney contacted Hanson and he supported my position.[76]

The third occasion involved a telephone conversation with CSFB attorneys Patrick Patalino (Patalino) and Gary Lynch (Lynch), a former SEC Director of Enforcement, on approximately June 8, 2005.[77] As was the practice, I called Patalino to request that he agree to accept service of a subpoena on CSFB, which he did agree to do. During the call, I also requested Patalino to treat the issuance of the subpoena confidentially, as I had heard other staff do in similar situations before. Patalino replied that CSFB also desired that the matter be treated confidentially and then left the line for a moment. When he returned, Lynch was patched into the call. Lynch asked aggressively: Are you saying that I should keep this matter confidential from John Mack? I responded politely: "No, I am just requesting that you keep the matter confidential." Lynch asked the same question two more times and I gave the same answer. On

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ongoing investigations. Berger emphatically said "no" and offered several examples of influential individuals whose testimony had been taken in the past. Berger made no inquiry why Complainant had asked the question. Complainant then told Berger he was troubled with his supervisors' decisions relating to the Mack subpoenas and that he intended to resign, but would be willing to remain with the Commission until the investigatory phase of the PCM matter had been completed if this would be helpful. Berger told Complainant that he would prefer Complainant set a specific date for his departure, since this would help Berger plan staffing needs.

The next morning, I informed Berger that I would leave the SEC on September 30, 2005.

[75] See the February 9, 2005, chain of emails among Kreitman, Hanson, and Aguirre, Ex. 64.

[76] See May 20, 2005, chain of emails between Hanson and Aguirre, Ex. 65.

[77] This would have occurred on or shortly before June 8, 2005, when I faxed the subpoena and covering letter to Patalino acknowledging that he had agreed to accept service.

the fourth occasion that Lynch asked the same question, I replied: I have answered the question three times." Lynch promptly left the call.

Kreitman came to my office about an hour later, said that Lynch had called Berger, and asked what happened during the call. I told him and he seemed satisfied. He never indicated that I mishandled the call in any way. He later told me that he had discussed the matter with Berger and he was fine with the manner in which I handled the call.

At the time of the call, Mack was no longer with CSFB. Thus, Lynch's question—whether my request applied to Mack—seemed puzzling. A couple of weeks later, I learned more about the relationship between Lynch and Mack and what might have prompted Lynch's call to Berger. On this point, my June 20 email to Hanson read:

> Incidentally, the above [a summary of the evidence suggesting that Mack might have tipped Samberg] may also help explain Lynch's call to Paul. Incidentally, Lynch advised Mack on at least one Pequot deal. Mack wrote Samberg on 2/6/02 stating, "I have checked with Gary Lynch and he confirmed that there is no conflict for me as an original investor [in Pequot]." Mack also hired Lynch: Here's one newspaper account: "Mack hires include ***Gary Lynch***, a former enforcement chief at the Securities and Exchange Commission, who is a vice chairman in charge of stock research and legal compliance ."[78]

Lynch also followed Mack back to Morgan Stanley in 2005 for pay package of $13.2 million[79] and represented Mack, according to the media, when the SEC took his testimony.[80]

In sum, none of my superiors ever suggested that I had dealt improperly with opposing counsel. None suggested that I handle similar situations differently in the future. As with other allegations, this one finds no support in any document until my July 27 email triggered the August 1 "reevaluation."

I should also point out that dealing with some opposing counsel was at times challenging. Shortly after becoming involved in the PCM investigation, Kreitman took a no-nonsense tone in dealing with PCM's counsel. For example, on February 27, Kreitman circulated his draft of a proposed letter to Audrey Strauss, the lead attorney representing PCM. He wrote: "I hope you don't mean to suggest that your new demand is a tactical response which would, as I'm sure you agree, might possibly be construed as unprofessional, unethical, even potentially illegal obstruction of a federal investigation."[81] On another occasion, Kreitman emailed staff regarding the latest failure of PCM's counsel to cooperate: "We need to continue to document this pattern of behavior with a view to possible §17(b) [Exchange Act] charge *and perhaps some disciplinary*

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[78] See June 20, 2005, email from Aguirre to Hanson at 10:18 am, Ex. 54.

[79] Jed Horowitz, *Morgan Stanley Welcomes Attny Lynch With $13.2 Million*, October 19, 2005, DOW JONES NEWSWIRES.

[80] Randall Smith, *Moving the Market: Morgan Stanley CEO Testifies In SEC Investigation of Pequot*, W. ST. J., August 3, 2006, at C4.

[81] See February 27, 2005, email from Kreitman to Hanson, Ribelin, and Aguirre; Ex. 66.

action against the law firm. (emphasis added)"[82] On another occasion, in an email copied to other staff, Kreitman advised Ribelin (who was himself frustrated with the tactics of PCM's counsel): "Tough tone always appropriate to prosecutors, Eric."[83]

b) He has difficulty explaining the significance of evidence in a linear fashion.

You are in a position to form your own judgment on this issue. I would point out that Kreitman, the author of this comment, invited me in the spring of 2005, as a guest lecturer, to explain the significance of the Enron case to his Georgetown law school class.[84]

6) Mr. Aguirre threw tantrums.

This is false. The theory is also inconsistent with Kreitman's certification on June 1, 2005, that my oral communications were "appropriate for the intended audience" and my "required personal interactions with internal and external constituencies/counterparts [were] generally responsive to the needs of these individuals and entities."[85] Further, it would seem that throwing "tantrums" would generate at least one email from one of my supervisors to me or to another supervisor. Indeed, no other SEC witness spoke of any tantrums, not even Hanson who worked more closely with me than Kreitman. Once again, this ground was not asserted in either the termination notice or the "reevaluation." Finally, I understand that your Committee has received an email from another staff attorney who had the opportunity to observe my conduct quite closely. That attorney unequivocally disputes Kreitman's testimony.[86]

There was one tantrum, however, that I do recall. It was thrown by Kreitman at about 4:30 pm on June 29, 2005, following a meeting between the two of us in his office. I tried to discuss with him the evidence calling for the issuance of the Mack subpoena, but he would not listen and grew increasingly agitated. As I was leaving his office and walking down the hall, Kreitman followed me and screamed: "Let's go see Paul [Berger]! Let's go see Paul." It did not seem appropriate at the moment to cross the building to Berger's office, given Kreitman's behavior. So, I turned to him and said: I am returning to my office to send you an email about the decisions you just made. I then did exactly that.[87] Kreitman did not respond for almost four weeks.[88]

7) Mr. Aguirre submitted his resignation at least twice.

The evolution of this allegation illustrates just how the SEC can take a truth and rework it into a lie. The truth was stated in the termination notice: I resigned once and only once.[89] Hanson's written testimony is very close to the truth: "He tendered his resignation from the

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[82] See February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin, and Aguirre Ex. 67.
[83] See February 11, 2005, email from Kreitman to Ribelin, Hanson, and Aguirre, Ex. 68.
[84] See my CV, provided to the Judiciary Committee.
[85] See SEC form 2494, Ex. 1.
[86] I was asked by this staff person not to disclose his or her identity out of concern that the SEC may engage in some form of reprisal.
[87] See June 29, 2005, email from Aguirre to Kreitman, Ex. 57.
[88] See July 25, 2005, email from Kreitman to Hanson and Aguirre, Ex 98.
[89] See termination notice, Ex. 96.

Commission in July 2005. Some time thereafter he withdrew his resignation."[90] Only the date was a little wrong: I resigned on June 30.

But there is a problem for the SEC with the single resignation theory. My one and only resignation occurred immediately after both Kreitman and Berger refused to reverse or even discuss the decision giving Mack preferential treatment.[91] Such favoritism violates federal regulations directly applicable to the SEC.[92] My supervisors' decision left me with two options: (1) execute my supervisors' decision to give Mack special treatment and thereby join with them in the violation of the same federal regulations or (2) challenge their decision which would likely be, and in fact turned out to be, a career shortening decision. Facing this choice, I initially decided to leave the SEC with a positive record and move on with my life.[93]

The multiple resignation theory overcame this flaw: Aguirre did not resign because of an unlawful decision by his supervisors; he was just an unstable employee who habitually offered his resignation and withdrew it. But this new factual theory also had a flaw: it was a lie. Consequently, it was not documented in any official record, e.g., the termination notice, or even in an informal communication, e.g., an email. To the contrary, the termination notice stated: "on one occasion, you submitted (and later withdrew) your resignation to your Associate Director ..."[94]

Still the lie would have had a fighting chance to sound like truth if it were said often enough and consistently. A lie by all four SEC officials sounds more convincing than a lie by only one. But alas, the four did not get their stories straight in their written testimonies. Both Hanson and Thomsen went with the single resignation theory,[95] while Kreitman and Berger were just as sure there were multiple resignations.[96] Berger told the smoothest version of the lie: "At one point, I learned that Mr. Aguirre purported to resign and then rescinded his resignation shortly thereafter. In the summer of 2005, he did it again, this time submitting his resignation to me."[97]

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[90] *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Robert Hanson, Branch Chief Division of Enforcement U.S. Securities and Exchange Commission Washington, D.C.) (Hereinafter "Hanson's testimony").

[91] *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Gary J. Aguirre, Former Investigator, U.S. Securities and Exchange Commission, Washington, DC, part II) (Hereinafter "Aguirre's testimony").

[92] See 17 C.F.R. 200.55, 17 C.F.R. 200.58, 17 C.F.R. 200.61, 17 C.F.R. 200.64, 17 C.F.R. 200.735-2, and 17 C.F.R. 200.51.

[93] My decision to leave the SEC and the factors that caused me to reevaluate that decision are stated in my written testimony.

[94] See termination notice, Ex. 96.

[95] See Hanson's testimony and *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Linda C. Thomsen, Director of Enforcement, U.S. Securities and Exchange Commission, Washington, D.C.) (Hereinafter "Thomsen's testimony").

[96] Kreitman's testimony; and *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006). (Statement of Paul Berger, Former Associate Director, Division of Enforcement U.S. Securities and Exchange Commission, Washington, D.C.). (Hereinafter "Berger's testimony").

[97] *Id.*, Berger's testimony.

Of course, all of this created some unintended drama at the hearing. How would the four reconcile the Kreitman-Berger multiple resignation theory with the Thomsen-Hanson single resignation theory when they testified back to back? Obviously, both could not be true. And of course the questioning could get embarrassing.

To reconcile their testimony, the Four got creative. At the hearing, Thomsen would abstain; she would not even mention my resignation. Kreitman and Berger would both stick with the multiple resignation theory.[98] The tough assignment went to Hanson: he would have to bridge the gap between the single and multiple resignation theories at the hearing. How did he do that? At the hearing, Hanson testified that I resigned once, but he also speculated that I had thought about resigning on another occasion.[99]

Once again, there are no emails or other documents supporting any version of the multiple resignation theory for the same old reason: it did not happen. Incidentally, it would seem highly improbable that an SEC Senior Counsel would resign and neither he nor any of his supervisors would in any way document the resignation or the withdrawal of the resignation.

8) Supervisors pointed out premature testimony would be a fruitless exercise.

This is a new variant of the SEC's "ducks in line" theory, an SEC mantra at the hearing. Berger spent the most time articulating the theory. According to him, taking Mack's testimony would be the last duck to be aligned. The rest of investigation would be completed first.[100] In his testimony, Kreitman waxed eloquently regarding the "proper evidentiary foundation for the invocation of compulsory process." Curiously, the SEC failed to demonstrate that same reserve when it subpoenaed my communications with your Committee.

The "ducks in line" theory of course conflicts with the classic strategy for conducting an insider trading investigation: to pin down the tipper and tippee to a story as early as possible. I reminded my supervisors on at least two occasions that this classic principle required that Mack's testimony be taken early.[101] For example, my July 27 email to Kreitman and Berger observed:

> I also believe Mack's testimony should have been taken promptly for the same reason that staff normally takes early testimony of suspected participants in an insider trading investigation--to pin them down. This is particularly true here because CFSB and Morgan Stanley are still producing e-mails. Further Morgan Stanley will be friendly because Mack is now its CEO. CSFB will be friendly to Mack because Gary Lynch, who is going to Morgan Stanley in a couple of months to join Mack, controls the CSFB production responsive to our subpoena. Further delay allows Mack to concoct a story that is consistent with the

[98] See Berger and Kreitman's testimonies.
[99] Hearing RT, p. 40, ll. 17-24.
[100] *Id*., p. 60, ll. 15-23.
[101] See my July 27, 2005, email to Berger and Kreitman, Ex. 59; my August 4, 2005, email to Hanson; and my August 24, 2005, email to Berger, Ex. 60.

> information contained in the e-mails. On the other hand, if he did not provide information, that also may become clear.[102]

Berger's theory—complete the investigation before asking the tipper a question or getting his records—defies common sense. Evidence obtained from the tipper may complement or explain evidence obtained from the tippee. For example, suppose Mack's phone records for July 2001 showed he only made phone calls to Samberg on July 9 and July 24, the nights before Samberg made dramatic trading moves. Those *combined* facts—half from Mack, half from Samberg—would be circumstantial evidence, albeit not conclusive, that the tip flowed from Mack to Samberg.[103] On the other hand, if the phone records showed that Mack called Samberg every day, the calls on July 9 and July be probative that the tip flowed from Mack to Samberg.

Perhaps, the principle of collecting evidence from both sources was simply stated by David Becker (Becker), currently Berger's counsel. He served as the SEC General Counsel from 2000 to 2001. During a recent media interview, he explained the SEC's routine approach in conducting insider trading investigations. He put it this way: In insider trading cases, "you connect the dots not by simply going from one dot to another but by starting at both dots and working toward the middle."[104] When it came to investigating the GE- Heller, Berger only allowed the Samberg dot "to be worked." The Mack dot was off limits.

Shortly after the December 5, 2005, hearing, Hilton Foster, a former SEC insider trading expert, also weighed in on Berger's theory during a media interview. Dow Jones News quoted Foster:

> "Other people who haven't done as many of those types of investigations might approach it the same way they do a financial fraud case, which is totally different," said Foster, who trained SEC attorneys in how to handle insider-trading cases. "It's not necessarily wrong to wait until the end of an investigation to take someone's testimony, it's just that in an insider-trading case, it doesn't make much sense. "The bottom line is he should have been contacted sooner rather than later for his version of (what) had happened," Foster said.[105]

The "sooner rather than later" principle was how Foster taught me to conduct an insider trading investigation, when he lectured my incoming group of new investigators and countless times during the eight months he worked closely with me on the PCM investigation.[106] This

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[102] See my July 27, 2005 email to Berger and Kreitman, Ex. 59.

[103] United States v. Larrabee, 240 F.3d 18, 21 (1st Cir. 2001).

[104] Jonathan M. Katz, Larry Margasak, *Frist Updated on Blind Trust Investments, Despite Denials,* ASSOCIATED PRESS, September 24, 2005.

[105] Siobhan Hughes, *Third Person Warns About SEC's Handling of Pequot Probe,* DOW JONES NEWSWIRES, December 11, 2006.

[106] See for example: November 3, 2004, email from Aguirre to Foster, Cain and Grime, Ex.8; October 13, 2004, email from Aguirre to Cain, Ex.6; October 26, 2004, email from Aguirre to Hilton, Ex. 69; November 18, 2004, email from Aguirre to Foster, Ex. 70; November 22, 2004, email from Aguirre to Foster, Grime and Cain, Ex. 71; November 24, 2004, email from Aguirre to Foster, Ex. 72; December 2, 2004, email from Aguirre to Foster, Ex. 73; December 6, 2004, email from Aguirre to Foster, Ex. 9; December 7 2004, email from Foster to Aguirre, Ex. 74; December 8, 2004, email from Foster to David Kornblau, Kreitman, Cain and Aguirre, Ex. 75; December 8,2004,

principle was repeatedly emphasized by both Hanson and Kreitman during the PCM investigation. It was applied to all suspected tippers and tippees, except Mack. I had never heard of the "ducks in line" strategy in relation to an insider trading investigation from anyone at the SEC until Hanson used the phrase to defend the decision blocking the Mack subpoena *eight days before he and his superiors fired me.*[107]

But let us assume for a moment that Berger, Kreitman and Hanson actually believed their "ducks in line" strategy. As it turns out, the wisdom of the "sooner rather than later" strategy was once again proved by the SEC's handling of the Mack testimony. In particular, Hanson's testimony before your Committee demonstrated the flaw in the "ducks in line" theory. But his testimony must be carefully studied. Hanson labored to conceal these facts and he may have obstructed the investigation or committed perjury in the process.

Hanson testified that there were two people from whom Mack could have learned about the pending acquisition.[108] They were both employees of CSFB.[109] According to Hanson, the SEC took their testimony before the statute of limitations expired.[110] Again, according to Hanson, neither had knowledge of the acquisition and thus could not have told Mack about it.[111]

On this point, Hanson's testimony tracked similar factual statements in the SEC Case Closing Recommendation (CCR).[112] The CCR states that on July 27, 2006, the SEC "took the testimony of the two CSFB employees, a former CFO and a company lawyer, who were both involved in recruiting Mack. Both denied knowing about the merger before it was publicly announced, let alone telling Mack about it." That would seem to refute my theory that the CSFB CFO could have passed along information of the pending acquisition to Mack when the two met around June 28 or June 29, 2001. This timing was critical because Mack spoke with Samberg on the evening of June 29 and Samberg began trading the next trading day.

But later in his testimony, Hanson testified that CSFB's CFO had not spoken with Mack around June 28.[113] Thus, it was irrelevant whether the CFO knew about the pending acquisition. However, still later in his testimony, Hanson conceded that Mack had spoken with officials from CSFB's parent—CS—around June 28, 2001. The SEC makes no claim its staff ever interviewed the CS officials, the ones Mack actually met with just before his call to Samberg.[114] Thus, the SEC never asked these CS executives—the right ducks—whether they had discussed the pending GE-Heller acquisition with Mack.

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email from Aguirre to Foster, Ex. 76; December 9, 2004, email from Aguirre to Foster, Ex. 11; December 14, 2004, email from Aguirre to Foster, Ex. 77; January 18, 2005, email from Aguirre to Foster, Ex. 78; January 31, 2005, email from Aguirre to Foster, Ex. 79; February 7, 2005, email from Foster to Aguirre, Ex. 80; February 9, 2005, email from Aguirre to Foster, Ex. 81; February 14, 2005, email from Aguirre to Foster, Ex. 82; my February 14, 2005, email to Foster, Ex. 83; and February 18, 2005, email from Aguirre to Foster, Ex. 85.

[107] See August 24, 2005, email from Hanson to Aguirre, Ex 130.

[108] Hearing RT, p 73, ll. 3-11.

[109] *Id.*

[110] *Id.* p 72, ll. 4-6; p. 73, 1-16.

[111] *Id.* p 71, l. 23 through p. 72, l. 6.

[112] The CCR was attached as an exhibit to the Thomsen written testimony, Ex. 115.

[113] *Id.* p. 81, ll. 9-23

[114] The SEC CCR only states that it took the statements of the CFO and a company attorney. Ex. 115.

This became clear at the hearing when Senator Specter questioned Hanson whether Mack had testified about meeting with any Credit Suisse officials around June 28, 2001. Hanson's evasive answer conceded that Mack had testified such meetings had in fact taken place.[115] The key testimony reads:

> Chairman Specter. Was Mr. Mack questioned about that [about his meetings with Credit Suisse during the 27th, 28th, and 29th of June], Mr. Hanson?
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> Mr. Hanson. Of course.
>
> Chairman Specter. And what did he say?
>
> Mr. Hanson. That the information that Mr. Aguirre alleged or speculated that Mr. Mack may have had was so far down in the weeds for Mr. Mack.
>
> Chairman Specter. So far down in the weeds?
>
> Mr. Hanson. It was so far removed from what he was doing with respect to negotiating with CS First Boston that it had no relevance to him. Not only that, but the people from CS First Boston that we talked to and received the e-mails from said that there is no possible way that they had the information, let alone passed it on to Mr. Mack.[116]

Hanson's evasive answers require translation. Mack met with Credit Suisse executives around June 28; any mention of the pending GE-Heller acquisition during those meetings "had no relevance" to Mack (it was just "so far down in the weeds"). The two CSFB employees the SEC interviewed—the imaginary ducks who knew nothing about the pending acquisition and did not meet with Mack in late June—speculated that the Credit Suisse executives—the real ducks who met with Mack at the critical time—did not know about the acquisition either.

Perhaps noteworthy, Hanson's "too far down in the weeds" testimony attributed a guiltless state of mind to a possible tipper in an insider trading investigation that Hanson himself was supervising. In effect, Branch Chief Hanson had become a character witness for the very person he was investigating. But this was not the only character reference this SEC branch chief gave Mack. Hanson also testified that—after meeting Mack—he (Hanson) had decided that Mack was not "a bad guy" after all.[117]

Hanson's statement that the two CSFB employees' testimony was taken before the statute of limitations is also misleading.[118] It omits a key fact: the date of their testimony, July 27, 2006,

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[115] Hearing RT. p. 82, ll. 10-12
[116] *Id.* p. 82, ll. 6-20.
[117] *Id.* p. 55, ll. 22-23.
[118] Hearing RT, p 72, ll. 4-6; p. 73, 1-16.

was exactly five years *to the day* from the date that PCM did its last trade before the announcement.[119] The five year limitations period expired that same day.

The SEC of course did not take Mack's testimony until August 2, 2006, five days after the key statute of limitations period had expired. Hence, the SEC did not learn until then that it had not interviewed the right ducks, the Credit Suisse executives that Mack had actually met with in late June 2001. Thus, in applying the ducks-in-line theory to the Mack testimony, the SEC had lined up the wrong ducks and did not find out about the right ducks until the key limitations period had expired.

I warned Hanson and Berger that the information from the CSFB staff attorney gave on this exact point—who Mack spoke to in late June 2005—might be wrong. On this point, my August 4, 2005, email (which Hanson provided to Berger and Kreitman[120]) reads:

> Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he ... spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team [at] Morgan Stanley at this time. That would take the investigation in a completely different direction.[121]

Equally bizarre was Hanson's explanation why the SEC had allowed the statute of limitations to expire before taking Mack's testimony. Hanson explained: "We got to it as soon as we could. The predicate to trying to figure out whether to take Mack's testimony or not was whether he had the information."[122] In short, the "ducks in line" theory caused the SEC to allow the statute of limitations period to expire on its strongest remedy against its only verifiable tipper suspect in order to establish the "predicate" for taking his testimony. This kind of "predicate" paralyzes law enforcement. Only Mack got one in the PCM investigation.

To summarize, the "ducks in line" strategy is not merely a violation of the classic practice of pinning the tipper and tippee down, e.g., as the SEC did with Martha Stewart. According to the Four's story, they were busy lining up imaginary ducks until the statute of limitations ran out. I submit the Four are not so naïve. In truth, the "ducks in line" theory is just an *ad hoc* rationalization to justify the Four's decision to give Mack favored treatment.

9) Mr. Aguirre's subpoenaed too many emails, over 19 million.

This theory seems to have been cooked up for the hearing. For this reason, Kreitman did not even remember it until Hanson came to his rescue. As the C-SPAN video reveals, Kreitman first testified that subpoenas I had issued in the PCM investigation resulted in the production of 5

[119] PCM's last trades in GE and Heller were executed on July 27, 2001. See June 27, 2005, email from Aguirre to Kreitman Hanson and Ribelin, Ex. 55.

[120] See August 5, 2005, email from Hanson to Aguirre, Ex. 112.

[121] See my August 4, 2005 email to Hanson and my August 24, 2005 email to Berger, Ex. 60.

[122] Hearing RT, p. 74, l. 10.

million emails.[123] But then Hanson whispered something to Kreitman and Kreitman changed his testimony.[124] Kreitman's corrected testimony on this point reads: "In this case, the subpoenas...that Mr. Aguirre sent out—resulted in the production of, I believe, more then 19 million emails."[125]

This was a stunning new fact: my subpoenas had caused the production of 14 million more emails than I knew about at the end of my tenure with the SEC. How could this have happened? My negotiations with PCM's counsel resulted in staff access to 3.3 million emails.[126] A few days before my termination, I told Hanson PCM had produced 4 million emails.[127] Kreitman's first number—5 million emails—was high but in the ball park. PCM had discovered a new source of emails shortly before I left, but this would not likely have resulted in the production of 14 million more emails.[128]

The SEC Case Closing Recommendation (CCR) reveals that Kreitman, with the help of Hanson, again misled your Committee. Footnote 1 to the CCR states that "Pequot alone made available approximately 19.8 million *pages* of electronic email..."(emphasis added) Kreitman's testimony is misleading in two regards. First, he states more than 19 million "emails"—not pages—were produced. Second, Kreitman states that the emails were produced in response to my subpoenas *alone*. This again is erroneous: the CCR states that the SEC issued numerous subpoenas after I left. Hence, the 19 million pages would include documents produced to the SEC in response to subpoenas issued by other staff members after I left.

Incidentally, Kreitman and Hanson were informed of every step I took to obtain PCM's email production. Beginning in January 2005, before the first subpoena was issued, I updated Hanson and Kreitman on the steps being taken to subpoena the PCM emails.[129] Both Kreitman

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[123] The reporter's transcript does not state Kreitman's testimony regarding the five million emails. It is clearly audible on the C-Span video (rtsp://video.c-span.org/15days/e120506_judiciary.rm) at 1 hour, 43 minutes and 40 seconds.

[124] *Id.*

[125] Hearing RT, p. 76, l. 9-12.

[126] See June 10, 2005, email from Aguirre to Ribelin, Foster, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke; Ex. 52.

[127] See August 26, 2005, email from Aguirre to Hanson at 10:42 am, Ex. 86.

[128] See August 25, 2005 email from Aguirre to Hanson, Jama, Eichner and Ribelin, Ex. 101.

[129] See for example, January 25, 2005, email from Aguirre to Hanson, Ex. 16; Kreitman's February 14, 2005, email from to Hanson and Aguirre, Ex. 21; February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 25; February 22, 2005, email from Aguirre to Hanson, Kreitman, Foster, and Ribelin, Ex. 26; February 25, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 28; March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29; March 9, 2005, email from Aguirre to Hanson and Kreitman, Ex. 30, March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson, Ex. 31; March 15, 2005, email from Aguirre to Hanson, Kreitman, Ribelin, Thomas Conroy, Stephen Glascoe, and Foster, Ex. 32; March 16, 2005, email from Aguirre to Hanson, Foster, Ribelin, Conroy, Ivarone, and Plimpton, Ex. 33; Aguirre's March 16, 2005, email from Aguirre to Kreitman, Hanson, Plimpton, Ivarone, Foster, Conroy and Ribelin, Ex. 34; March 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 35; March 29, 2005, email from Aguirre to Hanson and Ribelin, Ex. 36; April 13, 2005, email from Aguirre to Hanson, Ex. 37; April 11, 2005, Ex. 38; April 22, 2005, email from Aguirre to Hanson and Kreitman, Ex. 39; April 29, 2005, email from Aguirre to Hanson, Ex. 40; May 6, 2005, email from Aguirre to Hanson, Ex. 41; May 10, 2005, email from Aguirre to Kreitman and Hanson, Ex. 43; May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, James Eichner and Conroy, Ex. 45; May 24, 2005, email from Aguirre to Hanson, Foster, Ribelin, Eichner, O'Rourke, Ivarone and Kreitman, Ex. 46; May 25, 2005, email from Aguirre to Hanson, Ex. 48; June 2, 2005, email from Aguirre to Kreitman, Ex. 50; June 10, 2005, email from

and Hanson actively participated in those decisions.[130] The major breakthrough in obtaining PCM emails occurred on May 20, 2005, when I reached a tentative agreement with PCM's counsel by which the SEC would have immediate access to approximately 3.3 million emails.[131] When I informed Kreitman of the tentative agreement, he replied, "Sounds like Gary's strategy outsmarted (or terrified) Audrey and is resulting in real progress. Excellent!"[132]

10) Mr. Aguirre sent out too many subpoenas.

This allegation tracks a similar allegation Kreitman made about too many emails. It went unmentioned in any evaluation (including the "reevaluation"), the termination notice, or any other document. No supervisor ever suggested that too may subpoenas had been issued. To the contrary, Grime, Kreitman and Cain all emphasized the importance of issuing subpoenas to those possessing relevant documents.[133] Grime and Cain said subpoenas should be issued to all those who had been requested to produce records.

Nor can Kreitman or Hanson even claim they were unaware of the number of subpoenas that were issued. I had over 150 email exchanges with my supervisors regarding the issuance of subpoenas, their terms, or the opposing counsel's contentions.[134] For example, I provided both Kreitman and Hanson on February 18, 2005, with an initial list of twenty-seven individuals that Foster and I intended to subpoena in connection with the PCM investigation. [135] Neither even commented.

Robert Hanson:

1) Mr. Aguirre would not memorialize investigation.

See response to Kreitman comment 4.

Aguirre to Ribelin, Hilton, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke, Ex. 52; June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin, Ex. 56; July 29, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Eichner and Liban Jama, Ex. 58; February 9, 2005, email from Aguirre to Kreitman and Hanson, Ex. 64; May 11, 2005, email from Kreitman to Hanson, O'Rourke, Ribelin, Foster, and Aguirre, Ex. 89; May 11, 2005, email from Hanson to Aguirre, Ex. 90; August 25, 2005, email from Aguirre to Hanson, Jama, Eichner and Ribelin, Ex. 101; June 3, 2005, email from Eichner, to Kreitman, Aguirre, and Hanson, Ex. 105; March 11, 2005, email from Kreitman to Aguirre and Hanson, Ex. 107; March 15, 2005, email from Hanson to Aguirre, Ex. 108; March 15, 2005, email from Kreitman to Hanson, and Aguirre, Ex. 109; August 4, 2005, email from Aguirre to Hanson, Eichner, Jama, Ribelin, and Miller, Ex. 118; May 26, 2005, email from Aguirre to Hanson, Ex. 121; May 24, 2005, email from Aguirre to Hanson, Ex. 124; May 26, 2005, email from Thomas Sporkin to Aguirre, Ex. 125; and May 26, 2005, email from Sporkin to Aguirre, Ex. 126.

[130] *Id.*

[131] See June 10, 2005, email from Aguirre to Ribelin, Foster, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke, Ex. 52.

[132] See May 20, 2005, email from Kreitman to Berger, Hanson, Ribelin, Foster, Eichner, Conroy, and Aguirre, Ex. 45.

[133] See January 7, 2005, email from Grime to Cain, Foster, and Aguirre, Ex. 131; February 18, 2005, email from Aguirre to Hanson, Ex. 24; and February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 25.

[134] See footnote 40.

[135] See February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 24.

2) Mr. Aguirre was disrespectful and abusive to at least 3 attorneys.

Like a vintage wine, this charge has steadily improved with time. In the August 1 "reevaluation," my alleged problem with other staff attorneys arose out of my refusal to share information. The "reevaluation" reads: "Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses."[136] In its second iteration, found in the termination notice, my problem with other attorneys became a stand alone allegation. It reads: "you have conflicts with other staff attorneys ..."[137] The most recent variant, as stated in Hanson's testimony, upgrades the charge a couple of notches: Aguirre was "disrespectful and abusive" to at three least attorneys.[138]

Once again, the SEC makes no concrete charge much less offer any evidence. I understand Hanson is referring to O'Rourke, Eichner and Jama. O'Rourke and Eichner were assigned to the PCM investigation in May 2005. Jama was assigned in June. I respond to the SEC's accusation in relation to Eichner and Jama in this section to O'Rourke in the next.

Some background may be helpful to place the SEC's accusation in perspective. Aside from O'Rourke, Eichner, and Jama, I worked with over twenty staff members—some very closely—on the PCM investigation during my tenure with the SEC. They included Foster and Ribelin who you have interviewed. They also included a financial analyst,[139] an intern[140] and a paralegal[141] temporarily assigned to the PCM investigation. Additionally, with my supervisor's approval, I sought out and obtained the assistance of staff from five other SEC offices or to work on the case. This includes staff from (1) the Division of Investment Management (IM),[142] (2) the Office of Compliance Inspections and Examinations (OCIE),[143] (3) the Office of Economic Analysis (OEA),[144] (4) the Office of Information Technology (IT),[145] and (5) the Office of Market Surveillance (MS).[146] I also coordinated the PCM investigation with another Enforcement group conducting a related investigation.[147] I believe my relationships with all of these staff members were cordial and productive. In any case, the SEC has made no contrary assertion.

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[136] See "reevaluation," Ex. 95.
[137] See termination notice, Ex. 96.
[138] Hanson's written testimony.
[139] Marina Ulmishek.
[140] Nancy Miller.
[141] Constance Williams.
[142] Charlotte Buford, Barbara Chretien-Dar, Brian Murphy. See, for example, March 2005 chain of emails from Aguirre to Barbara C. Chretien-Dar (IM), Ex. 62, and April 2005 chain of emails between Aguirre and Brian Murphy (IM staff), Ex. 134.
[143] Shannon Behara, Melissa Clough, Gene Gohlke, and Brian Snively. See, for example, February 8, 2005, email from Brian Snively's (OCIE staff member) to Aguirre, Ex. 135.
[144] See, for example, September 27, 2004, email chain between Peter Simonyi and Aguirre (OEA staff), Ex. 136; and November 2004 email chain between Peter Simonyi and Aguirre, Ex. 137.
[145] Jason Ivarone, Jack Khan, Scott Plimpton, David Wiederkehr, Zaw Win and others.
[146] Joseph Cella, Thomas Conroy, Eric Ribelin, Stephen Glascoe, and others.
[147] In this regard, I coordinated the PCM investigation with Timothy P. Peterson. He was a Senior Counsel, assigned to a different Enforcement group, which was conducting a financial fraud investigation of one of the issuers under investigation in the PCM matter.

The SEC has produced no evaluations, except the "reevaluation," that criticized the manner in which I treated other staff members. As mentioned before, Kreitman's June 1 certification stated my personal contacts with other staff were acceptable. Hanson's June 29 evaluation emphasized my ability to work *effectively* with SEC and SRO staff. Hanson wrote: "Gary worked closely with the Office of Compliance Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads."[148]

Most of my communications with other staff were by email. I am submitting over a hundred emails to or from other staff as exhibits to this response. I have provided you with others. I note that your August 2, 2006, letter requested the SEC to produce emails relating to my employment and termination. I would invite Senate staff to randomly look through my emails to or from other staff for any hint of disrespect.

Three present or former SEC staff members have stepped forward to say that I handled the PCM investigation professionally. They have nothing to gain and much to lose by speaking out. I have also attached a copy of a card from one of the interns in Kreitman's group who worked closely with me on the GE-Heller investigation over the summer of 2005. She states: "I enjoyed working with you this summer. Thanks for making my experience such a rewarding one."[149]

All this raises an obvious question the SEC has ignored: Why was I able to work effectively with OCIE and SRO staff, as Hanson highlighted, and with so many SEC offices and divisions and yet, according to the SEC, was unable to do so with the attorneys my supervisors appointed to the investigation in May and June 2005?

My Communications and Contacts with Eichner from May Through Late July 2005

Eichner joined the SEC in April 2005. He was assigned to the PCM investigation immediately after Ribelin requested Kreitman to assign a second staff attorney to that matter. In his May 4, 2005, email to Kreitman, Ribelin stated the reasons for his request:

> [W]e still need another attorney. For example, we need to start conducting phone interviews and Gary simply doesn't have the time to review documents, prepare for testimony, conduct testimony and sit in on phone interviews.... Fried Frank [has] 20 lawyers (five partners and 15 associates) working on the matter and 35 contract lawyers working 10 hours per day, six days a week. We now have a story about the cross trades in the IPO after markets that we need to track down. My preference would be to get a subpoena out today to Pequot and to their executing brokers, but it is difficult with Gary in New York reviewing documents that were dumped on him (again at the last minute) for testimony tomorrow. Without the additional resources now, we will be greatly hampered going forward. [150]

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[148] See Ex. 2.
[149] See thank you note from intern Nancy Miller, Ex. 102.
[150] See May 4, 2005, email from Ribelin to Hanson and Kreitman, Ex. 103.

A few days later, Kreitman assigned Eichner to the PCM investigation.

Until early July, I had relatively little contact with Eichner on the GE-Heller investigation. At my suggestion, Hanson initially assigned Eichner in May 2005 to work up a second PCM insider trading matter involving its trading in Elite Information (Elite).[151] Elite was our strongest matter until the GE-Heller facts began to emerge in late April 2005.[152] I provided Eichner with the files on Elite, which by the way were well organized. From time to time, he asked questions about the Elite facts, which I answered. Eichner also attended the second Samberg examination on June 7, 2005.

In early June 2005, at Kreitman's request, Eichner researched whether PCM could validly object to the production of PCM emails by its spin-off, Andor Capital Management (Andor).[153] I had also researched the same issue. Eichner and I reached the same tentative conclusion: PCM's objection was not valid.[154] Later in June, Hanson reassigned Eichner to work on the PCM wash trades investigation, which meant that he would be dealing mostly with Ribelin and other MS staff.

I recall an email chain initiated by Eichner in the first part of June. We had no personal relationship at the time. His first email stated only this: "is the aguirre [sic] quoted in the clips about cox [sic] related to you?"[155] Eichner referred to an internal SEC republication of a Los Angeles Times article, titled "Cox's Past Ties to Con Man Raise Questions," in which my brother was quoted.[156] In response, I told Eichner that the Aguirre quoted in the article was my brother. Eichner's next email read: "You might want to change your name when the new Chairman arrives." My reply to that email got this response from Eichner: "I guess the two apples don't fall far from each other (and presumably not to far from the tree). Of course, I was joking about the name change (although using an alias when Pequot goes to the commission can't hurt ☺)"[157]

Eichner gradually became more directly involved in the GE-Heller investigation in July 2005. From time to time, he requested various PCM documents and I provided them to him. We also attended the same PCM staff meetings. I recall no hint of conflict or any significant difference of opinion regarding tactics, strategy or investigative plan. Indeed, agreeing with me, Eichner told Kreitman during a staff meeting that the prohibition on talking with Irvine Pollock and Larry Storch about the backup tapes made no sense. Kreitman said that he would talk it over with Berger. A few days later, Kreitman authorized staff to contact Storch and Pollock about the backup tapes.[158] I recall no other significant contacts with Eichner until late July 2005.

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[151] See May 11, 2005, email chain between Aguirre and Hanson, Ex. 104.

[152] *Id.*

[153] See June 3, 2005, email from Eichner, to Kreitman, Aguirre, and Hanson; Ex. 105.

[154] See June 3, 2005, email from Aguirre to Hanson, Ex. 141, and June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre, Ex. 143.

[155] June 9, 2005, email from Eichner to Aguirre at 3:40 pm, Ex. 132.

[156] Michael Hiltzik, *Cox's Past Ties to Con Man Raise Questions,* LOS ANGELES TIMES, June 9, 2005, at C1.

[157] June 9, 2005, email from Eichner to Aguirre at 4:26 pm, Ex. 132.

[158] According to Kreitman's testimony at the December 5, 2006, hearing, there was an issue whether Storch and Pollock represented PCM. Hearing RT, p. 84, l. 22 through p. 85, l. 1. That was not true. When I spoke with Storch around July 11, he told me that they had represented PCM from sometime in May. Hanson and Kreitman had me send an email to Storch confirming that fact. See the draft of that letter and Hanson's July 13, 2005, email to me, Ex. 106.

On a Second Track: the August 1 "Reevaluation"—Just a Little "Constructive Criticism"

Meanwhile, on a separate track, two interconnected events in late July 2005 would shape all others to come, including my dealings with Eichner and, to some extent, with Jama. Those events were: (1) my meeting with Berger on July 21 or 22 during which I told him about Hanson's decision blocking the Mack subpoena and his statement attributing that decision to Mack's political influence[159] and (2) my email of July 27 confirming and restating my earlier comments to Berger regarding Mack's favored treatment.[160] Three days later, on August 1, Berger, Kreitman, and Hanson would collaborate and create the "reevaluation,"[161] a process rarely, if ever, used at the SEC.[162]

That "reevaluation" described a person who had no future at the SEC. He had conflicts with other staff, drew complaints from opposing counsel, misstated SEC policy, issued subpoenas that violated the privacy laws, refused to share information, and, worst of all, was "resistant to supervision" and "insufficiently cognizant of institutional protocols."[163] There would seem to be only one option with such an employee: fire him immediately before he could cause any more damage to the agency. Kreitman testified to as much when he said that an unacceptable rating in any category described in SEC Form 2494 would require immediate termination.[164] The August 1 "reevaluation," if true, was equivalent to an "unacceptable" rating for each of the four categories in Form 2494.[165]

This "reevaluation" was a three-level drop from what Berger had approved less than two weeks earlier at the compensation committee meeting. The four levels were described in the declaration of the Enforcement Division's Chief Accountant, Susan Markel (Markel) filed by the SEC in my pending FOIA/Privacy Act case.[166] Markel coordinated the merit pay raises in July and August 2005.[167] She described the four levels as follows:

> 4. The spreadsheet included a column showing whether each employee's supervisor had provided a summary of the employee's contributions as well as columns showing the recommendations that each employee's immediate supervisor had made regarding the employee's contributions. For each employee, supervisors could say that the employee had (1) made contribution of the highest quality, (2) made contributions of high quality, (3) made contributions of quality, or (4) made no significant contribution beyond an acceptable level of performance.[168]

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[159] See July 27, 2005, email from Aguirre to Paul Berger and Kreitman, Ex. 59.
[160] *Id.*
[161] See Ex. 2.
[162] Hearing RT, p. 87, ll. 4-25.
[163] See August 1, 2005, "reevaluation" of Gary Aguirre, Ex. 95.
[164] Kreitman's written testimony. Also, Hearing RT, p. 91, ll. 11-15.
[165] I submit this is self-apparent when the deficiencies stated in the "reevaluation" (Ex. 95) are compared with the requirements stated in SEC Form 2494 for "an "acceptable" rating, see Ex. 1.
[166] January 8, 2007, declaration of Susan Markel Ex. 138.
[167] *Id.* par. 2.
[168] *Id.* par 4.

Had the "reevaluation" gone into effect, it would have dropped my performance rating from contributions of "high quality" (level 2), through contributions of "quality" (level 3), through the "acceptable level" (level 4), to an unacceptable level (implied level 5).

There was of course one possible option to the "fire him immediately" solution. My supervisors could have told me, the employee with the alleged deficiencies described in the August 1 "reevaluation", the unvarnished truth and demanded immediate improvement. The Four did the exact opposite. None hinted that my performance had been reevaluated or that my performance was deficient in any regard, much less the twenty-three particulars they now describe. Instead, my supervisors waited until I was on vacation some twenty-five hundred miles away and then they fired me on one day notice.

Berger faced a formidable challenge in explaining the August 1 "reevaluation" at the hearing. He had sat on the compensation committee that approved my two-step merit increase on July 18. Nine days later, he received my email questioning Mack's special treatment. Less than three days after that, he initiated the process that resulted in the "reevaluation." I was out of the office on official leave for most of the time between July 18 and August 1. In short, absolutely nothing had happened between July 18 and August 1 that could conceivably trigger the reevaluation. Here is how Berger explained his flip flop on rating my performance rating in less than two weeks: "I noted, though, that the draft evaluation did not contain any *constructive criticism*. ... They decided that, *to be fair* to Mr. Aguirre, they should include some *constructive criticism* (emphasis added)."[169]

So, according to Berger, the "reevaluation" was just "constructive criticism ... to be fair to Mr. Aguirre"? If so, it is a rare specie. For it to work, someone would have to tell me about it. I did not see the "reevaluation" until October and then only after pressing the SEC to reconcile my two-step merit pay increase on August 21 with my firing 11 days later.[170] And then in response to my inquiry, the SEC lied about the history of the "reevaluation."[171] The August 1 "reevaluation" also seems a tad severe for constructive criticism: it describes my performance three levels below the finding of the compensation committee two weeks before. I submit the "reevaluation" was a termination notice; it just did not get served for another month.

Berger's testimony about the "reevaluation" incorporates a second lie. His testimony continued: "They [Kreitman and Hanson] showed me those comments and told me that they had relayed their substance to Mr. Aguirre." With this, Berger, Kreitman, and Hanson have offered three different stories whether the "revaluation" was shared with me. Kreitman first stated it was not given to me or shown to me, but he later claims it was shown to me. Hanson came up with his own version: another half truth: the "reevaluation" was not shown to me [true] because I was on vacation [false].[172]

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[169] See Berger's written testimony.

[170] September 21, 2005, email from Aguirre to Delores Ruffin, Ex. 110.

[171] Even then the SEC gave no clue when this "reevaluation" was completed. Instead, the SEC sent it to me as part of Kreitman's September 26 email along with this lie: "The attached supervisory summary from Mark Kreitman *mistakenly* did not go to the compensation committee (emphasis added)", Ex. 111. The compensation committee, with Berger as a member, met on July 18, 2005; the "reevaluation" was done at Berger's suggestion on August 1, 2005, almost two weeks after the meeting.

[172] Hanson's written testimony.

Why the intrigue about the August 1 "reevaluation"? Why did it never find its way to my personnel file? Why was I never told about it much less shown it? Why did my supervisors have conflicting stories? What exactly was being covered up? I submit there is a simple answer to all these questions: My supervisors had decided to fire me after Berger received my July 27 email, and the "reevaluation" was the first step. Apparently, the "reevaluation" came too late to intercept my two-step merit pay increase, which all of my supervisors approved less than two weeks before. Thus, Berger, Kreitman, and Hanson were stuck with their positive performance evaluations which were likely on their way or had already arrived at Human Resources. To fire me at that moment—days after my email questioning Mack's special treatment which came on the heels of the two-step merit increase—would be tantamount to a consent judgment for reprisal under 5 U.S.C. 2302 (b)(8). The SEC needed a little time to dilute the obvious causal connection between my July 27 email and the August 1 "reevaluation." They had that time since my probationary period would not expire for another five weeks.

But there was a downside in keeping me around another month. I might have found more evidence pointing to Mack. That would have made it even tougher to maintain the pretense—then or later—that no cause existed to subpoena Mack. It was, therefore, not enough to block the Mack subpoena; nor was it enough to erect a nine-foot evidentiary bar to any reconsideration of that decision. The investigation of Mack would be brought to a halt. Hanson would encourage, if not direct, Eichner and Jama to move the GE-Heller investigation away from Mack. He would also put a hold on another subpoena which was "critical," as I told him, if I was to have "any chance in getting over what I [saw] as a 9' bar."[173] Likewise, in the last two weeks of August, as discussed next, every step I initiated toward developing any evidence to overcome that nine-foot bar was blocked. Since Berger suggested the "reevaluation" to Kreitman and Hanson in late July, it seems logical that he also made a similar suggestion to steer the GE-Heller investigation away from Mack.

Back to Square One: Eichner's Initiation of the Search for a New Tipper

The SEC's Case Closing Recommendation (CCR) states that the SEC began hunting for new tippers in September 2005. It reads: "Starting in September 2005, the SEC staff focused on identifying other potential tippers who could have provided Samberg information about the GE/Heller transaction."[174]

Actually, the search for other tippers began earlier. It was first discussed at a meeting convened by Hanson on July 27 for staff working on the PCM insider trading investigation. During this meeting, Eichner announced that he would begin looking for new possible sources of the GE-Heller tip (other than Mack) to Samberg. Hanson quickly embraced the idea and requested that Jama and I assist in this effort. A few hours earlier, I had notified Berger that I was withdrawing my resignation and would question the decision to block the Mack subpoena through appropriate channels.[175]

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[173] See August 26, 2005, email from Aguirre to Hanson, Ex. 114.
[174] See SEC Case Closing Recommendation on the Pequot Capital Management investigation, Ex. 115.
[175] My communications with Berger on this point on July 27 are discussed at page 14 of the OSC complaint.

Following up on Hanson's request, I sent an email ("Developing other possible GE-HF tippers") the next day to Hanson, Eichner, Jama and Ribelin suggesting a starting point for the search for a new tipper suspect—various Samberg acquaintances at Morgan Stanley. It read in part:

> Following up on the discussion yesterday, I am also attaching the part of the Samberg exam where I asked him about his acquaintances at Morgan Stanley in 2001, to be distinguished from the questions about his contacts with anyone at MS who had any involvement in the acquisition. Like John Mack, most of these people are fairly prominent, e.g., Byron Wien. I did not run thorough searches on Onsite's or our databases for those on Samberg's Morgan Stanley acquaintance list.[176]

I also expressed my doubts that this new search would find another tipper suspect as promising as Mack, but did not rule out that possibility: "Although I have my doubts from my review of Samberg's e-mails, it is conceivably possible to develop the facts suggesting a possible tipper: trust relationship with Samberg, possible access to info, contacts with Samberg at key times, and motive to pass along tip."[177] Mack satisfied each of these criteria.[178]

Finally, I suggested that any search for a new tipper suspect would likely hit the same impasse that was blocking the Mack subpoena at that moment: "However, if you get that far, there will remain another obstacle as I understand our current thinking—establishing evidence that the person 'went over the wall' before you can take his or her exam. I suspect that will not be easy to do."[179]

On August 3, Eichner circulated an email on the same subject.[180] He suggested several steps to implement the search for another possible tipper. He also observed, "It seems like our efforts so far have been based on the assumption that Samberg got the tip directly."[181] I responded with:

> Not exactly an assumption. More of a working hypothesis that tip went directly to Samberg. Got there because all other trails came up dry and continue to do so--and more and more evidence pointed to the tip going directly to Samberg. But take a stab at it. Who knows, could lead somewhere.[182]

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[176] See July 28, 2005, email from Aguirre, to Hanson, Jama, Ribelin, and Eichner, Ex. 93.

[177] *Id.*

[178] My August 4, 2005, email, Ex. 60, stated that evidence established that Mack satisfied each of these factors: trust relationship with Samberg, possible access to info, contacts with Samberg at key times, and motive to pass along tip.

[179] Kreitman had stated in his July 25, 2005, email to me (Ex. 98) that there would have to be proof that Mack was "brought over the wall" before any subpoena was issued to him. I responded to this contention by my July 27 email to Kreitman and Berger, Ex. 59.

[180] See August 3, 2005, email from Eichner to Ribelin, Jama, Hanson, Miller, and Aguirre, Ex. 116.

[181] *Id.*

[182] See August 3, 2005, email from Aguirre to Eichner to Ribelin, Jama, Hanson, Miller, *Id.*

Later that day, Hanson jumped into the discussion. Responding to Eichner's email, Hanson added: "These sound like excellent ideas to me."[183] Hanson directed that Eichner's suggestions be implemented. In response to Hanson's email, I pointed out that all but one of the steps Eichner had proposed had already been implemented months before, but I also suggested to Jama where he should look for the information Hanson had directed him to collect on the open item.[184]

The search for another tipper suspect was puzzling. Enormous human resources had been expended over the past eleven months to identify the strongest PCM insider trading case, which was by consensus GE-Heller.[185] Likewise, the evidence pointed to Samberg as the tipper.[186] The evidence trail also led to Mack as the most likely source of the tip, as summarized in several of my emails.[187] Hanson pointed to the next logical step in his August 5 email: "I think we should meet after some of the facts in the memo [my August 4 email] are nailed down to discuss whether it makes sense to go forward."[188] Instead of using our limited resources to nail down the facts on Mack, as Hanson had suggested, he was directing staff to start from scratch to find a new suspect.

Nevertheless, I expressed no objection to Eichner's proposed search for a new tipper suspect. I expressed, however, my view that it would not likely be a productive endeavor. But I offered my guidance and assistance to Eichner on how he might begin the search for a new evidence trail. I also included Eichner's new search in the investigative plan.[189]

The August 17 Phone Call

In the second half of August, I was critical of Eichner's handling of two matters involving the same opposing counsel. This was the only time I spoke critically to Eichner and I believe it was warranted. Both incidents had their origin in the afternoon of August 17, 2005, my last day in the office before going on vacation.[190] During the prior two weeks, I had little contact with Eichner.[191]

Late that morning, Kreitman had circulated an email to Eichner, Jama, Hanson (who was on vacation) and me. He asked: "Where are we on determining the date Mack was brought over the wall re GE-Heller deal—the necessary perquisite to subpoena to (sic) Mack (emphasis added)?" This was more a declaration than a question. It reinstated the requirement that I prove that Mack "was brought over the wall" before I could issue any subpoena to him. It effectively revoked Hanson's last position expressed in his August 5 email: that the facts in my August 4

[183] See August 3, 2005, email from Hanson to Eichner, Miller, Jama, Ribelin, and Aguirre, Ex. 117.
[184] See August 4, 2005, email from Aguirre to Hanson, Eichner, Jama, Ribelin, and Miller, Ex. 118.
[185] See May 11, 2005, email from Hanson to Aguirre, Ex. 104.
[186] See June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 55.
[187] June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin, Ex. 56; July 27, 2005, email from Aguirre to Paul Berger and Kreitman, Ex. 59; and August 24, 2005, email from Aguirre to Berger; and August 4, 2005, email from Aguirre to Hanson, Ex. 60.
[188] See August 5, 2005, email from Hanson to Aguirre, Ex. 112.
[189] See August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman, Ex. 127.
[190] I would not return to my office, since I was fired while on vacation.
[191] I was out of the office for much of the first two weeks of August on official leave.

email would be "nailed down" and then a decision would be made "whether it [made] sense to go forward."[192] My August 4 email assumed no direct proof that Mack had knowledge of the acquisition, much less that he "was brought over the wall." [193] Thus, according to the Kreitman email, no subpoena would be issued to Mack even if the facts in my August 4 email were "nailed down." Hence, my focus shifted back to overcoming Kreitman's revived objection. There were few possibilities.

Later that day, I emailed Eichner and Jama and asked if they wished to participate in calls that afternoon, including a call with Andor's attorney, James Benjamin (Benjamin), to confirm the testimony of Andor's CEO, Daniel Benton (Benton), for the week of September 5.[194] Benton had been Samberg's partner at PCM when Samberg directed the trades in GE-Heller. I expected that he would be a cooperative witness and possibly provide information about Samberg's trading in GE-Heller, Mack's connection with Samberg and PCM, or both.[195]

Eichner showed little enthusiasm for moving promptly with Benton's testimony. He replied: "If you aren't going to be back until the 6th do we really want to take Benton's exam that week?" I replied: "Good for background for Dartley (the PCM trader who executed the GE and Heller trades) and Samberg exams."[196]

Later that day, Eichner, Jama and I called Andor's attorney, Benjamin. On the subject of Benton's testimony, Benjamin said Benton would not be available during the week of September 5. Thus, we began to discuss the week of September 12. My August 26 email to Hanson and Kreitman picks up from this point:

> I went off the line to ask Jim E if we could go ahead during the week of the 12th. He agreed and made no mention that we should avoid the 14th or 15th. I went back on line and told Benjamin he could give us any date during the week of the 12th. Jim said nothing. Had he raised the issue, I would have limited the dates by Jim's availability. When Benjamin came back later with the 14th, Jim said he had an examination on that date. We went back to Benjamin a couple more times, finally pressing him for the 15th, which he agreed to do by rescheduling his calendar.

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[192] See August 5, 2005, email from Hanson to Aguirre, Ex. 112.

[193] See August 4, 2005, email from Aguirre to Hanson, Ex. 60.

[194] See August 17, 2005, email from Aguirre to Jama and Eichner, Ex. 128.

[195] Eichner also would not accept Benjamin's position that Andor had no objection to producing PCM backup tapes containing PCM emails. See August 24, 2005, email from Aguirre to Kreitman and Hanson (Ex. 129). Those backup tapes may have included missing Samberg emails for the critical time period of June and July 2001.

[196] I do not have a copy of Eichner's email, but my answer of the same date incorporates his questions. See August 17, 2005, email from Eichner to Aguirre, Ex. 128. His questions and my replies are in different font. For the sake of clarity, Eichner's questions and my responses were as follows:

Eichner: "If you aren't going to be back until the 6th do we really want to take Benton's exam that week?"

Aguirre: Good for background for Dartley and Samberg exams."

Eichner: "I don't think Liban has had the chance to look at the back up materials. Should we wait to call until he has?"

Aguirre: "The testimony is for all our learning curves."

Eichner: "What is the issue with Harnish. I thought they were going to complete the production by 8/23?"

Aguirre: "He was to give us some feedback today whether they have Mack trading records. Also, some other gaps in subpoena."

> Then, Jim said he had testimony on that day as well. Hence, we now have to go back for another change only because we are cannot get our own calendars straight.[197]

As stated above, because of Eichner's "calendar conflicts," the Benton testimony was scheduled, unscheduled, scheduled, and then unscheduled again, and would have to be rescheduled again. The first "calendar conflict" was surprising. When Jama emailed that Benton had confirmed the September 14 date for Benton,[198] Eichner replied that he had testimony scheduled on September 14. His August 18 email read: "As we discussed, that is the day [September 14] I am taking testimony in the PIPES case."[199] I replied:

> I'm a little confused.
>
> Before I told Benjamin that we he could schedule it during the week of August 12, I went off line and asked you if it was OK if Liban and I handled this one. You said yes. Based on your statement, I told Benjamin he could schedule it during this week if necessary. It would have been helpful had you spoken out at that time. Have you changed your mind?[200]

Eichner replied:

> I didn't change my mind. I was just telling you guys that I wouldn't be there on that date.
> However, when I talked to Liban, *he suggested we find another date* (emphasis added).[201]

This was even more puzzling. According to Eichner, it was Jama who made the decision to get another date. Yet, according to Jama, as I recall, Eichner made the request because of his conflict.

In any case, Jama went back to Benjamin to get the examination set for September 15, when Eichner would be free. When Benjamin rescheduled his calendar to accommodate *our* request, Eichner suddenly had a *new* calendar conflict for the 15th. This was again surprising: his August 18 email only indicated that he had one conflict, September 14. As Eichner put it: "That's the day I'm taking testimony in the PIPES case."[202]

A second issue dealing with opposing counsel arose during the discussion with Benjamin on August 17. It related to PCM's backup tapes that had been in Andor's possession since it split off from PCM in September 2001, two months after PCM's trading in GE-Heller. I told

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[197] See August 24, 2005, email from Aguirre to Kreitman and Hanson, Ex. 129.
[198] See August 18, 2005, email from Jama to Aguirre and Eichner, Ex. 133
[199] See August 18, 2005, email from Eichner to Liban and Aguirre, *Id.*
[200] See August 18, 2005, email from Aguirre to Eichner and Jama, *Id.*
[201] See August 22, 2005, email from Eichner to Aguirre and Jama, Ex. *Id.*
[202] See August 18, 2005, email from Eichner to Aguirre and Jama, Ex. *Id.*

Kreitman and Hanson about the existence and possible relevance of these tapes two months earlier in my May 31 email (subject: "Some missing tapes found?). It read:

> Jim Benjamin of Akin Gump represents Andor, the entity that Dan Benton, Samburg's protégé, created when he broke from Pequot. Benjamin told me that Andor has two of Jim seems cooperative at this point. Do we want the tapes or just e-mails? Since Pequot gave tapes to Andor (a different entity), we could take the position that Pequot waived any privilege (emphasis added).

> Jim Benjamin of Akin Gump represents Andor, the entity that Dan Benton, Samburg's [sic] protégé, created when he broke from Pequot. Benjamin told me that *Andor has two of Pequot's backup tapes dated June and July of 2001, the very months Samburg would have been considering Heller Financial.* Jim seems cooperative at this point. Do we want the tapes or just e-mails? Since Pequot gave tapes to Andor (a different entity), we could take the position that Pequot waived any privilege. Jason Ivarone is checking out whether we could retrieve e-mails or whether it would have to go to vendor. We could also seek all e-mails if Andor retrieved e-mails from the tapes.
>
> There seem to be a shortage of Samberg e-mails for July. He is averaging approximately 2,000 e-mails a month but we have only 837 for July 2001. This makes no sense, because Pequot was it largest at this point and there was much going on.[203]

Hence, the backup tapes might lead to evidence to overcome the nine-foot bar.

Months earlier, I had discussed a strategy with Hanson to obtain the backup tapes and he asked me to present the strategy to Kreitman, which I did.[204] Kreitman initially had some concern whether the tapes could be privileged,[205] but both Eichner's and my tentative research suggested they were not and Kreitman seemed to agree.[206] In early August, however, Eichner had reversed his opinion and became convinced that the tapes were privileged. His rationale rested on the theory that Andor's attorneys would object to the production of the tapes. I told Eichner more than once that Bejamin was not objecting, but Eichner, who had not spoken with Benjamin, did not accept my statement.

During the phone call with Benjamin on August 17, I decided to ask Benjamin again whether Andor objected to producing the PCM backup tapes, so Eichner could hear Benjamin's response first hand.[207] I summarized the background facts and what transpired during the call with Bejamin in my August 24 email to Hanson and Kreitman:

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[203] See May 31, 2005, email from Aguirre to Hanson and Kreitman, Ex. 139.

[204] See June 2, 2005, email from Aguirre to Kreitman, Ex. 140.

[205] See June 3, 2005, email from Aguirre to Hanson, Ex. 141.

[206] See June 3, 2005, email from Eichner to Kreitman, Hanson, and Aguirre, Ex. 142; and June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre, Ex. 143.

[207] See August 24, 2005, email from Aguirre to Hanson and Kreitman, Ex 133.

> Prior to the conversation referred to above with Benjamin, I repeatedly told Jim that **Benjamin was not objecting** to the production of the Andor tapes. Jim ignored my comments and repeatedly stated we have to find out Andor's position. This has moved in circles for weeks. To put the matter to rest, I put this question to Benjamin during the call with Liban and Jim E: "Jim, would you refresh me on your position on the Andor tapes?" He again said Andor had no objection and he had placed this issue in Pequot's lap, which was all he thought he had to do under the agreement. Jim E then picked up the conversation and asked Benjamin the same thing in a different way and once again got the same answer. He then went a step further: he asked Benjamin his opinion of the validity of Pequot's position. I did not object to Jim's question because I did not want to emphasize it, but I do not think it is appropriate for an SEC attorney to ask Benjamin, Andor's attorney, how he feels about the position Strauss is taking on behalf of Pequot. This suggests that we do not have confidence in our own analysis. If we do not, why should Benjamin? Further, we can assume that Benjamin and Audrey are talking and that Benjamin will pass along to Audrey the fact that we are asking him about the validity of her position. You guys make the calls, but I think this demonstrates a certain lack of confidence on our part. As you must know, Audrey is adept at exploiting weaknesses in the SEC's position. [208]

After the call, Eichner immediately declared that Benjamin's position—that Andor did not object—was unacceptable and he would have to "take a more concrete position that he had."[209] Eichner's stance made no sense and his questions to Bejamin—what did he think of PCM's position?—left the impression that we lacked confidence in our position. I expressed my concerns to Eichner[210] and, when he rebuffed them, to Kreitman and Hanson.[211] Neither supported Eichner's position.[212]

Berger, Kreitman, and Hanson Had Backed Some Conflict into the Case.

The obstacles with the Andor tapes and Benton testimony were just two of the multiple obstacles during the second half of August that derailed the GE-Heller investigation. When I left on vacation, I circulated an email describing "Pequot pending matters."[213] Eight of the ten matters sought evidence which might help convince my supervisors to reconsider their decision blocking the issuance of the Mack subpoena. Jama and Eichner were supposed to follow through on these matters while I was away. None would progress an inch after I left.[214]

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[208] *Id.*

[209] See August 24, 2005, email from Kreitman, to Aguirre and Hanson, Ex. 145. This does not seem to be the one you need here.

[210] See August 23, 2005, email from Aguirre to Eichner at 1:50 pm, Ex. 144.

[211] See August 24, 2005, email from Aguirre to Hanson and Kreitman, Ex 133.

[212] Kreitman replied: "Seems to me the agreement between Andor and Pequot is a matter for them to resolve. Why don't we simply ask Andor to respond to our subpoena. If they assert privilege, we'll inquire as to the basis and go from there." See August 24, 2005, email from Kreitman, to Aguirre and Hanson, Ex. 145; and Hanson, August 26, 2005, email from Hanson to Aguirre, Ex. 133.

[213] See August 17, 2005, email from Aguirre to Jama, Eichner a d Kreitman, Ex. 127.

[214] I refer to items 1 through 5 and 7 through 9 of my August 17 email, Ex 127. Item 1 (Benton testimony) encountered one Eichner calendar conflict after another. Item 2 (testimony of Dartley, who executed GE-Heller trades) still had not been set. I received no feedback on Item 3 (subpoena for Mack's deals), item 4 (status from Larry Storch on PCM missing and corrupted backup tapes), item 5 (possible Mack emails after he left Morgan

One key item was the draft subpoena for CSFB, which I left with Jama to finalize.[215] One hour of Jama's time would have sent the subpoena out the door. It sought, among other things, emails and other communications between CSFB and its parent CS relating to Mack and GE-Heller. Hanson would not send out that subpoena until September 1, 2005, the day the SEC fired me.[216] I had described the importance of the subpoena to Hanson with these words: "if we are to have any chance in getting over what I see as a 9' bar, these docs are critical."[217] Significantly, Hanson effectively conceded at the December 5 hearing that Mack had met with CS officials just before Mack's call to Samberg on June 29.[218]

The stall on everything prompted my email with this subject: "S/L will soon be an issue in GE/Heller 10b against Samberg" to Kreitman, Hanson, Eichner, Ribelin, and Jama. It read in part:

> We have miles to go before we could file a 10b action against Samberg and the investigation on these examinations and other aspects has slowed to a snail's pace. I do not see why are so relaxed about the scheduling on these exams and others. It may bite us in the end.[219]

With hindsight, I submit that some tension was cooked into the cake in the last two weeks of August. One force likely stopped each of these steps: the Mack subpoena, the CSFB subpoena, the Andor subpoena, the Benton testimony, the PCM subpoena seeking Mack's investments, and everything described in my August 17 email to Jama and Eichner.[220] The same force likely prompted the search for new tipper suspects. After Berger *et al.* decided to fire me for questioning their decision to give Mack favored treatment, it made no sense to allow me to strengthen the case against Mack. That would only increase the risks to my entire chain of command for blocking the Mack subpoena and firing me. I submit a full-blown cover up of the Mack decision was taking shape. For that reason, on August 29, 2005, three days before I was fired, I contacted the Disclosure Unit of the Office of Special Counsel to discuss the filing of a complaint arising out of the PCM investigation.[221]

Stanley), item 6 (FBI status on Zilkha), item 7 (Samberg phone records which might have shown calls to Mack for critical GE-Heller period), item 8 (subpoenas to CSFB), Item 9 (Andor backup tapes which might have contained missing Samberg emails for key GE-Heller period), or Item 10 (progress of Eichner's search for new tipper suspect). I handled item 4 myself while on vacation since no one contacted Storch and the missing backup tapes could contain relevant emails.

[215] See August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman, Ex. 127, item 8(f) in the email.

[216] Hanson's oral testimony, Hearing RT, p. 71, l. 23, through p. 72, l. 10.

[217] See August 26, 2005, email from Aguirre to Hanson, Ex. 114.

[218] Hearing RT, p. 73, ll. 1-16.

[219] See August 26, 2005, email from Aguirre to Kreitman, Hanson, Eichner, Ribelin, and Jama, Ex. 119.

[220] See August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman, Ex. 127.

[221] I discussed with Office of Special Counsel attorney Mathew Glover whether nonpublic documents relating to an ongoing SEC investigation could be filed with a whistleblower complaint.

The allegation that I treated Jama with disrespect or abuse is mystifying. Since I began working with Jama, I believe we were in the process of developing a personal relationship. We discussed personal matters, e.g., our families. We both expressed interest in the possibility that he would work closely with me on the insider trading investigation.[222] However, in late August, Jama was the point person to follow up on the "Pequot pending matters," which dealt almost exclusively with GE-Heller and to a large extent with Mack.[223] When I called in or emailed, the answer was always the same: such and such and such did not happen. I am sure that the frustration in my voice was evident, but it was not directed at Jama. Nor did he seem to take it that way.

3) Mr. Aguirre misrepresented Commission policy to opposing counsel.

This is one of the half truths that fictionalize a real event. I will discuss the real event first and then the SEC's effort to fictionalize it. The facts below also address Hanson's accusation that I was abusive or disrespectful to O'Rourke.

The PCM investigation hit an impasse in February 2005—foot-dragging by PCM's attorneys in producing their client's emails. On February 15, 2005, I emailed Kreitman, Hanson and other staff, pointing out the following: "In 12 weeks, we've got 1/2 of 1% of the e-mails Pequot was requested and now subpoenaed to produce. At this rate, we have only 48 years to go."[224]

The primary reason for the delay, according to PCM's lawyers, was their need to review *every* email to determine whether it contained a privileged attorney-client communication. During a phone conference on February 4, 2005, Kreitman proposed a shortcut to the PCM's attorneys: "There are software systems that can isolate e-mails that can be privileged. We can also give you assurance that if we receive any e-mails that are privileged we will return them."[225] The PCM attorneys did not agree to Kreitman's proposal at that time.

But the PCM attorneys themselves suggested the same approach in May 2005. By my email of May 11, 2005, I informed Kreitman, Hanson, Ribelin, Foster and Kevin O'Rourke (O'Rourke) that PCM's attorneys were willing to produce the emails subject to the offer Kreitman had made in February. My email read: "Audrey told me they are ready to discuss using search terms (attorney's names) to ID possible attorney attorney-client documents, with our agreement to return any privileged documents inadvertently produced (emphasis added)."[226]

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[222] June 20, 2005, email from Aguirre to Hanson and Kreitman, Ex. 146.

[223] See August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman, Ex. 127

[224] See February 15, 2005 email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Williams, Conroy, and Ivarone, Ex. 87.

[225] I referred to Kreitman's offer twice in my May 24, 2005, emails. See May 24, 2005, email chain; Ex. 120. I also recall that Hanson gave me his handwritten notes which recorded Kreitman's comments during that telephone conference. I placed these notes with mine in a folder in the PCM files maintained in my office. See February 4, 2005, staff meeting notes, Ex. 148.

[226] See May 11, 2005, email from Aguirre to Kreitman, Hanson, O'Rourke, Ribelin, and Foster, Ex. 88.

Kreitman responded by email: "Progress"[227] and Hanson's email said: "Good. What's your take?"[228] Ribelin, Foster and O'Rourke did not respond. After which, I informed PCM's attorneys that I believed we would agree in principle to return inadvertently produced emails, but the language would have to be worked out.

Later in May, I asked Kreitman and Hanson for their suggestions how to draft the language to be included in the agreement to cover the return of inadvertently produced, privileged emails. Kreitman told me that it was an SEC policy to do so and Hanson told me where I could find the controlling policy on the SEC website.

On May 24, 2005, I circulated a *draft* letter (which would be sent to PCM's attorneys once consensus had been reached) among Kreitman, Hanson and five other staff members, including O'Rourke, seeking their input on the letter. My email contained notes to five staff members seeking their specific input on various points discussed in the proposed letter. There were two notes to Hanson seeking his input on the language covering the return of emails. The note in the text of the email read: "Bob: I need to get the guidelines again relating to the return of inadvertently produced privileged communications (emphasis added)."[229] The draft letter attached to my email contained the following proposed language and comment highlighted in green: "Further, the Staff represents that Commission policy is to return inadvertently produced documents containing privileged attorney-client communications, without a request to do so. [Bob: I need to reread the guidelines again on this point]" Hanson responded by citing the location on the SEC website which stated the SEC policy applicable to inadvertent production, thereby confirming his approval to this approach.[230] Kreitman did not immediately respond.

After studying the SEC policy, which Hanson cited in his email, I drafted and circulated proposed language to my supervisors for their approval or comments. It read:

> Redraft now reads:
>
> Staff will return any privileged material that was inadvertently produced by PCM's counsel upon its request. Further, the Staff represents that the Commission's policy is to return an inadvertently produced document that is clearly a privileged attorney-client communication, without a request to do so, and to either return or notify the party's counsel if an inadvertently produced document contains material that is possibly privileged.

O'Rourke vigorously objected to both drafts mentioning the SEC policy to return inadvertently produced documents subject to the attorney-client privilege. He also accused me of "taking it upon" myself to disclose SEC internal policy[231] After O'Rourke objected to the

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[227] See May 11, 2005, email from Kreitman to Hanson, O'Rourke, Ribelin, Foster, and Aguirre, Ex. 89.

[228] See May 11, 2005, email from Hanson to Aguirre, Ex. 90.

[229] See May 24, 2005 email from Aguirre to Kreitman, Hanson, Foster, Ribelin, Eichner, O'Rourke, and Ivarone, Ex. 46.

[230] See Hanson's May 24, 2005, email to Aguirre: "See attached on our policy for inadvertent production. http://enforcenet/investigations/red%20flag%20issues/inadvert%20doc%20production.htm", *Id.* Ex 46.

[231] May 24, 2005, email from O'Rourke to Hanson, Foster, Ribelin, Eichner, Ivarone, Kreitman and Aguirre at 5:54 pm, Ex. 120.

proposed language, Kreitman asked me to remove the proposed language from the draft letter, which I did. PCM's attorneys insisted that the letter contain some language by which the SEC agreed to return privileged emails. I prepared a third draft removing any language referring to the SEC policy of returning privileged emails. Hanson approved the revised language[232] and the final letter went out a week later.[233]

Turning now to the SEC's fiction, it states that I "misrepresented Commission policy to opposing counsel." This is false and misleading at multiple levels. First, neither draft discussing SEC policy was provided to opposing counsel. I circulated both drafts internally and invited comments of other staff. Nor were the contents of either draft discussed with opposing counsel. The final draft sent to opposing counsel, approved by Hanson, contained no language regarding SEC policy.

But the SEC's statement is also misleading. The original idea to return privileged documents was Kreitman's idea.[234] I told O'Rourke and reminded Hanson and Kreitman of this fact with my last email on May 24: "I proposed the statement because my AD [Assistant Director, which referred to Kreitman] told Audrey Strauss that we would return all unprivileged documents which were inadvertently produced if Fried Frank would conduct an electronic search to identify potentially unprivileged documents." Third, the specific approach used in my first two drafts—citing SEC policy on the inadvertent production of documents—came out of discussions with my supervisors—Kreitman and Hanson—how the agreement should deal with that issue. Indeed, Hanson expressly approved this approach; he cited me to the SEC website after I informed him in my email that I intended to use this language in drafting the agreement.[235] Finally, I believe the statement in my second draft, describing SEC policy, accurately and concisely described that policy as it would apply to PCM's production.

4) Mr. Aguirre's records and files were disorganized and sloppy.

Once again, this is a new contention. It was not mentioned in my termination notice or my "reevaluation." My positive evaluations speak to the contrary. Nor are there any emails or other contemporaneous documents supporting this accusation.

I spent approximately thirty or more hours a week organizing and filing documents. Other staff came in and out of my office requesting documents. Hanson and Kreitman both came to my office, Hanson more frequently. On one occasion I reviewed with Kreitman my document organization. On another occasion, I provided Eichner with the extensive files relating to PCM's trading in Elite Information. No one—neither staff nor supervisors—ever suggested that the files were disorganized or sloppy. The electronic files which I maintained relating to the PCM investigation were accessible to all staff working on the matter, including every supervisory

[232] A meeting between Hanson and me on this point was scheduled by our email exchange on May 25, 2005. My May 25, 2005, email to Hanson read: "Please see me re some of the changes." Hanson's email of the same date to me read: "Come on by." See May 25, 2005, email exchange between Hanson and Aguirre, Ex. 91.

[233] The revised language read: "Staff will return any written or electronic communications which are protected by PCM's attorney-client privilege upon the valid assertion in writing by PCM of such privilege in relation to a specific e-mail or when the privileged status of any such e-mail otherwise becomes known to Staff." See May 31, 2005 letter from Aguirre to Audrey Strauss Ex, 147.

[234] See February 4, 2005, staff meeting notes, Ex. 148.

[235] May 24, 2005, email from Hanson to Aguirre, Ex. 46.

level. I received no complaints regarding the manner in which I had organized or maintained those files.

To be sure, staying current with PCM's hard copy and electronic document production was not easy. At one point, the PCM was producing approximately 80,000 documents a week. PCM and its officers were represented by seven law firms, including two former Directors of the SEC's Enforcement Division. One law firm had fifty-five attorneys working on the case. In all, I was personally dealing with approximately fifty individual attorneys.[236] Given the volume of documents the PCM investigation was generating, I applied for the appointment of a paralegal to assist with document organization.[237] Both Hanson and Kreitman approved my application. The staff person who evaluated these requests for the Enforcement Division concluded that the case met the qualifications for the appointment of a full-time paralegal, but Berger would also have to request the appointment.[238] He refused to do so.

5) Mr. Aguirre made factual statements that turned out to be mere speculation.

I understand that senior SEC officials previously contended that factual statements in my emails were erroneous. Since no evidence supported that allegation, it morphed into a new one—that I made factual statements that turned out to be speculation.[239] As before, the SEC has provided no concrete examples where any "factual statements...turned out to be mere speculation."

My emails summarizing the evidence were commonly circulated among my supervisors and other staff. I never received an email or spoken comment from anyone that any factual statement in any of my emails was inaccurate.[240] For example, my nine-page email to Hanson, Kreitman and Ribelin summarizing the testimony of Samberg in early May and June.[241] I later forwarded it to Jama and Eichner.[242] Ribelin, Eichner and Jama attended one or both Samberg examinations. No one suggested that any factual statement was inaccurate or turned out to be speculation. Likewise, I provided Hanson, Kreitman and Berger detailed evidentiary analyses why I believed the Mack testimony should be taken, including my email of August 4, 2005.[243] Again, no one ever told me of any inaccuracy in this email. Hanson said he was going to fact-check that email, but I never heard back from him.[244]

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[236] See May 4, 2005, email from Ribelin to Hanson and Kreitman at 12:05 pm, Ex. 103.

[237] See May 9, 2005, email from Aguirre to Lesley Florschutz with copy to Kreitman, and Hanson, Ex. 42.

[238] See May 23, 2005, email from Florschutz to Aguirre, Ex. 92.

[239] Hanson stated in his written testimony: "Information that Mr. Aguirre presented as fact often turned out to be mere speculation based on fragments of information that did not reflect reality."

[240] I recall two occasions when my emails inadvertently referred to the wrong person and one occasion to the wrong company. On another occasion, I referred to an attorney with by wrong surname.

[241] See June 27, 2005, email from Aguirre to Kreitman, Hanson and Ribelin, Ex. 55.

[242] See July 28, 2005, email from Aguirre to Hanson, Jama, Ribelin, and Eichner, Ex. 93.

[243] See August 4, 2005, email from Aguirre to Hanson, Ex. 60.

[244] *Id.* See also Aug 5, 2005, email from Hanson to Aguirre, Ex. 94.

6) Mr. Aguirre's desire to take Mack's testimony was because of his high profile status and not evidence based.

This newly-minted accusation is ridiculous. It does not appear in the "reevaluation," the termination notice or, to the best of my knowledge, any email or other document the SEC has produced. The evidence trail simply led to Mack's door, and with more clarity as time passed. When I sent my June 28, 2005, email to Kreitman, Hanson and Ribelin, I stated that there were four other possible but less likely sources of the tip. Those possibilities were eliminated by the time I sent my August 4, 2005, email to Hanson. On this point, it stated: "The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate."[245]

Obviously, Hanson and Kreitman thought the same when they authorized me to present the evidence to the FBI and the US Attorney in connection with a possible criminal proceeding against both Mack and Samberg. Or did they also decide to do this because of Mack's high profile status? And, once again, the SEC has produced no emails or other documents lending the slightest support to this theory.

7) Mr. Aguirre was disorganized and unprofessional during Samberg's June testimony.

Again, I never heard this contention while I was at the SEC. I circulated a summary of the testimony of this examination to five other staff members, including four that were present at the examination.[246] I had positive feedback from most of the staff members present at the testimony, including Ribelin (who at the time had seventeen years of experience wit the SEC) and Foster (who at the time had thirty years of experience with the SEC and was the SEC insider trading specialist). On questioning by Senator Grassley, Hanson testified at the December 5, 2006, hearing that the source of this information was another Senior Counsel who attended the examination. The only two at the examination—other than Foster—were Eichner and Jama, who had each been with the SEC less than two months at the time of the second Samberg examination.

8) Mr. Aguirre left work abruptly after disagreements with other attorneys.

This is another half truth. It is true that I left the office "early" on two occasions during the period from September 2004 until September 2005. On both occasions, Hanson approved my request to leave early. On both occasions, I left in the mid to late afternoon. On both occasions, I had already put in a full work day.[247] One occurred on June 28 when it first appeared that my entire supervisory chain had decided to block the issuance of a subpoena to Mack as favor to him or to Morgan Stanley. I decided to go home early on that day in order to give careful thought to

[245] See August 4, 2005, email from Aguirre to Berger, Ex. 60.

[246] See June 27, 2005, email from Aguirre to Kreitman, Hanson and Ribelin, Ex. 55.

[247] My first email on that day was sent at 5:46 am (see June 28, 2005, email from Aguirre to Kreitman and Hanson, Ex. 56). However, as I understood the applicable SEC workday, the time before 7:30 am did not count. I was approximately two hours short of a full workday.

my options for dealing with my supervisors' decision, which, in my judgment, would undermine the GE-Heller investigation violate the SEC's mission.

I met with Kreitman early on June 28, 2005, to discuss the GE-Heller investigation and my recommendation to issue a subpoena to Mack. Before that meeting, I had submitted two detailed emails and two spreadsheets[248] supporting my recommendation. Kreitman's refusal to even discuss this evidence, coupled with other recent events, pointed to an extremely distasteful conclusion. My entire supervisory chain seemed to be giving Mack preferential treatment. I asked Hanson if I could leave early that day and he approved my request. I left work at around 2:15. Since my workday had begun before 6 am on that day, I had already put in a full eight-hour workday before I left. Later, I approached Hanson with two separate forms in hand to adjust my time for the day. Hanson asked how much time I had missed on that day. I told him and he said that I did not have to file any form.

There was one other occasion that I asked to go home early. I am unable to pinpoint the date, because I can find no related emails. I believe it was likely in the first half of March. I do recall that it had been a long and frustrating day. In the mid afternoon, I told Hanson that I would like to leave early and he authorized my request. There was no discussion or hint that I was thinking about leaving the SEC. Of course, neither Hanson nor Kreitman made any reference to my early departure in my evaluations or in any other document.

9) Mr. Aguirre sent out several subpoenas violated privacy law.

See my response to Thomsen's more concrete allegation on the same point below.

Paul Berger:

1) Mr. Aguirre asked to report directly to an Assistant Director, outside the normal chain of command.

Neither this nor the next allegation is accurate. I met with Berger, as I recall, during the first week of January to discuss the possibility of transferring from Cain's branch.[249] I tossed out several possibilities for Berger's consideration: stay in Grime's group and report to a different branch chief, stay in Grime's group and report to him (as I had seen and was told some other staff attorneys did), transfer to a branch in Kreitman's group (Kreitman told me there was a vacancy in his unit), or transfer to another branch chief in a different group. During the conversation with Berger, he eliminated the possibility of reporting to Grime and was unsure whether a vacancy would exist in Kreitman's group. My confirming email to Berger did not limit his options. It read:

> For example, as we discussed, I understand that there will be an opening in Mark Kreitman's section in the near future and I would appreciate being transferred

[248] See June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 55, and June 28, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 56.

[249] For my reasons for seeking a transfer from Cain's group, please see my January 10, 2005, letter to Berger requesting a transfer, Ex. 122, and my response to Berger allegation 7.

there if possible. But I believe there are many others with whom I could work where my age and, consequently my experience, would not be a detriment.[250]

2) **Mr. Aguirre asked to work only for Mr. Kreitman.**

This is false. See my response to Berger allegation 1 above.

3) **Mr. Aguirre had shouted at and hung up on opposing counsel.**

This is simply false. As with the other accusations, this one is unsupported by any form of documentation. I would expect that hanging up on opposing counsel would have at least triggered one email. None of my supervisors ever suggested that I hung up on opposing counsel, that I treated them in a rude manner or that I should handle my calls differently in the future. For further discussion of my contacts with opposing counsel, please see my response to Kreitman allegation 5 (a), pp. 15-16.

4) **Mr. Aguirre left the premises several times for the remainder of the day without approving the leave.**

See response to Kreitman allegation 7, pp. 17-19.

5) **Mr. Aguirre resigned several times.**

Please see my response to Kreitman allegation 7 at pp. 17-19.

6) **Mr. Aguirre issued too many subpoenas during the course of the investigation.**

Please see my response to Kreitman allegation 10 at pp.25-26.

7) **Mr. Aguirre was unhappy with edits by Charles Cain "on a relatively ministerial matter".**

This was no "ministerial matter," nor was the issue whether I was "unhappy" with anyone's edits. Very simply, Cain instructed me to make a false statement in a Formal Order Memorandum to the five SEC Commissioners. I was personally and directly responsible for the accuracy of the representations in this memorandum.

On October 6, I prepared a draft Formal Order Memorandum and submitted it to branch chief Cain for his "comments and suggestions."[251] The draft stated the number of suspected insider trading matters that had been referred to the SEC over the two prior years. On this point, the draft read: "Over the past two years, SROs have referred or 'highlighted' at least six matters

[250] *Id.*

[251] See October 6, 2004, email from Aguirre to Cain, Ex. 4. I am attaching the single page from the redrafted Formal Order Memorandum, which contained this change.

involving possible insider trading by the Pequot Management and one or more of Pequot Funds to the Division of Enforcement."[252]

On October 7, Cain dropped off a copy of the Memorandum with his hand written revisions at my office while I was at a training session. One of Cain's revisions deleted the quoted language above about SRO referrals involving PCM and replaced it with the following language: "Subsequent investigation by the staff identified at least six transactions involving possible insider trading by the Pequot Management and one or more Pequot Funds."[253]

After reviewing Cain's comments, I went to his office to discuss the above change. I asked him if his revisions were intended to be final.[254] Cain said they were. I told Cain that the revision about SRO referrals above was not accurate because it suggested that I had uncovered six insider trading matters, when in fact those had been discovered by SROs and had been referred to the SEC. Cain angrily stated that the Memorandum was not going to state that Joe Cella (Assistant Director of Market Surveillance) had been informed but had failed to act on the prior SRO referrals.

The next morning, I sent an email to Cain and Assistant Director Richard Grime, Cain's immediate supervisor, stating my concerns:

> With training over, I will soon redraft and resubmit the Pequot action memo. I assume our primary concern is the memo's accuracy since it will be circulated among the Commissioners. In this regard, the proposed revisions would now offer this case history: The NASD referred the Elite Information matter to Enforcement in August 2003 and then, "Subsequent investigation by the staff identified at least six transactions involving possible insider trading by the Pequot Management and one or more Pequot Funds.
>
> This statement is unsupportable. Neither I nor anyone on the staff has discovered an insider trading transaction involving Pequot. Yes, I have prepared a spreadsheet of suspected Pequot insider trading activity since 1999. However, in each one of those 11 cases, an SRO identified the transaction and referred it to Enforcement (Market Surveillance), where it stopped. Under these circumstances, the quoted revision is not merely unsupportable; it could be the source of embarrassment or worse for each of us....
>
> Shall we discuss?[255]

Later that morning, Grime asked me to come to his office to meet with him and Cain regarding my email above. During this meeting, I informed Grime of the history that preceded his October 8 email. Grime agreed that Cain's language stating "Subsequent investigation by the staff identified at least six transactions involving possible insider trading ..." be removed from Formal Order Memorandum. The language was redrafted to read:

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[252] *Id.*
[253] See October 8, 2004, email from Aguirre to Cain and Grime, Ex 5.
[254] Cain's notes on the draft seemed to be final edits.
[255] See October 8, 2004, email from Aguirre to Cain and Grime, Ex 5.

> Over the past 15 months, the NASD and NYSE have made several referrals to the Division of Enforcement in which one or more hedge funds affiliated with Pequot Management has been identified for possible insider trading. Two of these referrals are discussed below.[256]

These facts were true. At the time this statement was submitted to the Commission, we knew of only three referrals over the prior eighteen months. I discussed this matter with Berger during the week of January 3, 2005, when I requested a transfer from Cain's unit.

8) **Mr. Aguirre refused to write up his investigation in the required formal memorandum.**

Please see my response to Kreitman allegation 4 at pp. 14-15.

Linda Thomsen:

1) **Ms. Thomsen stated in her testimony that Mr. Aguirre issued, "without his supervisors review or approval, subpoenas that violated federal privacy law, which were withdrawn after his supervisors learned of them. But for the supervisors' corrective actions, the former employee's work product could have been extremely damaging to the SEC."**

This is another half truth. This one is told by the SEC's Director of the Enforcement Division. More than anyone, she sets the standard of conduct for Berger, Kreitman and Hanson. She so thoroughly reworked the truth that it bore little resemblance to fact. The kernel of truth was this: I mistakenly issued two subpoenas in May 2005. As the documents tell, everything else about the Director's account is false. If a public company had massaged the truth in connection with the sale of securities, as the Director did with this allegation, it could expect the SEC to come knocking at its door.

Once again, neither Kreitman nor Hanson ever discussed this allegation with me at my evaluation. No one ever spoke to me about the matter after May 26, 2005. I did not learn that it was even an issue until I obtained the "reevaluation" more than a month after I was fired.[257] Once again, this allegation has improved with time. The "reevaluation" merely stated "certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes..." Thomsen's new and improved allegation tells how my "supervisor's corrective action" averted a crisis that "would have been extremely damaging to the SEC." In truth, when the matter occurred, my supervisors considered the mistake a non-event.

The issue of serving a subpoena on Bloomberg or similar email service providers was first discussed at a meeting on May 10, 2005, among Hanson, Kreitman, possibly Eichner and me. Hanson set the meeting to discuss my email, circulated earlier that day, proposing a plan to deal with PCM's attorneys regarding its email production.[258] One of the topics in my email was

[256] See October 22, 2004, email from Aguirre to Cain, Ex. 149.
[257] See August 1, 2005, "reevaluation", Ex. 95.
[258] See May 10, 2005, email from Hanson to Kreitman and Aguirre; Ex. 43.

the following: Samberg's Instant Messaging: "Samberg said in an e-mail (2003) that he only used IM to communicate with a certain group of people. If they have these IMs, they have not been produced."[259] I suggested during the meeting that we could also subpoena the PCM's instant messages directly from Bloomberg or PCM's other email service providers. No one questioned or objected to such subpoenas, nor did anyone mention any special requirements for their issuances.

I drafted proposed subpoenas to Bloomberg, AOL, and Reuters for Samberg's and PCM's emails and instant messages and emailed them to Hanson early in the morning of May 23, 2005. The text of the email read: "These were leftovers from last weekend"[260] and the subject read "subpoenas and other correspondence to be faxed on Monday."[261]

I did not get to the office until late morning because of a medical examination. Since I received no response from Hanson, as had occurred sometimes in the past, I assumed that he had no comment regarding the subpoenas. I therefore began faxing the subpoenas, including one to Bloomberg and one to Reuters. Sometime during this process, I learned that Hanson had not come to work that day and thus may not have seen the subpoenas.[262] I discontinued faxing the subpoenas until the next day.

By the afternoon of May 24, I had not received a response from Hanson to any of the emails I had sent to him on the prior day. I sent him two emails regarding the same subpoenas. In one email, I pasted the text of the document description in the body of the email; its subject was "Urgent, Samberg subpoena."[263] Hanson responded to that email.[264] I also sent him all of the subpoenas in a second email with this text: "These are the subpoenas that I forwarded Monday that still have not gone out."[265] Hanson did not respond to this email. Later that afternoon, I went to Hanson's office to speak with Hanson about another matter. He casually mentioned there could be "some privacy concerns" with the subpoenas that had gone to Bloomberg and Reuters, but he did not specify what the problem was or offer any guidance how to correct it. I told Hanson that I would look into it and take care of it.

I had taken the SEC course dealing with privacy issues, but it did not touch upon the issue of subpoenaing email service providers. That afternoon, my research on the SEC website failed to turn up anything helpful. That same afternoon, I called the attorney representing Reuters and asked him to disregard the subpoena in question. The next morning, May 25, I sent the Bloomberg attorney a fax requesting that he do the same.[266] Hanson had not requested that I take either step.

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[259] May 10, 2005, email from Aguirre to Kreitman and Hanson, Ex. 43.

[260] See May 23, 2005, email from Aguirre to Hanson, Ex. 123.

[261] *Id.*

[262] I had also sent Hanson several emails that morning and did not receive a reply.

[263] May 24, 2005, email from Aguirre to Hanson, Ex. 124.

[264] May 24, 2005 email from Hanson to Aguirre, Ex. 124.

[265] See May 25, 2005, email from Aguirre to Hanson, Ex. 47. In rereading that email, I noticed that one of the subpoenas that I had sent out was attached to this email.

[266] My letter to the Reuters's attorney confirming my call to him on May 24 is attached as Exhibit 150. My letter to Bloomberg's attorney on May 25 is attached as Ex. 17.

Also on the morning of May 25, I sent Hanson an email with this question: "can I see the documents that raise the privacy concerns?" Hanson replied by giving me the SEC internal address which addressed his "privacy concern."[267] I do not recall finding anything helpful on the website and told that to Hanson. Hanson then told me to contact another staff attorney, Thomas Sporkin (Sporkin), who was knowledgeable on how to handle this type of subpoena. I did so and Sporkin explained the process to be followed and said he would email me the address of the correct internal site.[268] Sporkin called back a little later and said he had given me the wrong site and he would send me another email with the correct site, which he did.[269] As I recall, this website discussed the applicable law.

On May 26, 2005, I apologized to Hanson for the error and informed him that I would not assume his consent in the future if he did not respond to my emails. Hanson said he was fine with my response and that was the end of it. In sum, I do not believe Hanson uttered more than three short sentences from beginning to end. His only email directed me to the wrong internal SEC site.

On June 1, 2005, I met with Kreitman and Hanson regarding my performance. Neither of them mentioned the subpoenas to Reuters and Bloomberg. Kreitman certified that my performance met all applicable SEC standards, including language that covered the emails issue on May 23. I never heard a word from Hanson or from anyone else regarding the subpoenas during the rest of my tenure with the SEC.

[267] See May 25, 2005, email exchange between Aguirre and Hanson, Ex. 48.

[268] See May 26, 2005, email from Thomas Sporkin to Aguirre, Ex. 125. Please note he cited me to a different internal site address than Hanson did in his May 25, 2005, email, Ex. 48.

[269] May 26, 2005, email from Sporkin to Aguirre, Ex. 126.

Senator Specter
Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity
December 5, 2006

I appreciate the opportunity to comment upon various contentions and accusations made by Linda Thomsen (Thomsen), Paul Berger (Berger), Mark Kreitman (Kreitman) and Robert Hanson (Hanson) during their testimony before your committee on December 5, 2006. I refer to them collectively below as the "Four."

1. Given your conflict with supervisors such as Mr. Kane, Mr. Hanson, Mr. Kreitman and Mr. Berger during your short tenure at the SEC, do you think it conceivable that the SEC terminated you out of concern that you would not take direction from your superiors?

Your question captures the essence of the Four's longest surviving explanation for terminating my employment. Some have surfaced only recently.[1] Other theories have come and gone.[2] But this one has been around awhile. Berger, Kreitman and Hanson christened the theory with their August 1 "reevaluation." It offered this example of Aguirre's resistance to supervision: "By failing to consult with his branch chef (sic), [Aguirre] inaccurately stated Commission policy in communication with defense counsel."[3] The Four also cited "resistance to supervision" in the September 1 termination notice.[4] Each of the Four touched on this theme during his or her testimony. Berger put it this way: "[T]he SEC decided not to extend Mr. Aguirre's employment beyond his probationary period because Mr. Aguirre could not or would not accept reasonable supervision and direction and arrogated to himself power that is not supposed to be exercised by any single member of the SEC staff."[5] Beyond any question, the Four have shown rare consistency in asserting this allegation. But a lie consistently told does not transform itself into truth. It is still a lie.

I respectfully submit there are at least four approaches to the evidence before your Committee in regard to this accusation. The most direct approach focuses on the concrete allegations which, according to the Four, demonstrate that I "resisted" their supervision. A second approach focuses on the causal link between my oral and email communications to Berger in late July questioning Mack's favored treatment, his abrupt decision a few days later to "reevaluate" my performance, and the Four's decision to fire me thirty days later. A third approach could focus on the Four's credibility: the fact that their accusations about my

[1] Many of the allegations made by Thomsen, Berger, Kreitman and Hanson in their oral and written testimonies were never mentioned at any time during my employment either verbally or in any evaluation, email or other document.

[2] For example, SEC's letter to the EEOC stated "Hanson's statement that I left for two weeks" in the March 21, 2006, letter from the SEC to the EEOC, previously provided to staff, which quoted Hanson's statement: that I "once left the job, saying only that [I] was resigning. [I] stayed away for two weeks."

[3] See August 1, 2005, "reevaluation", Ex. 95.

[4] See September 1, 2005, termination notice, Ex. 96.

[5] *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity:* Hearing Before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Paul Berger, Former Associate Director Division of Enforcement, U. S. Securities and Exchange Commission, Washington, DC). (Hereinafter, Berger's Written testimony).

performance are unsupported and indeed contradicted by contemporaneous documents which were generated when the events occurred. Why the need for these false attacks on my performance? Finally, a fourth approach could focus on how the SEC has handled the whole affair: its on-off-on Office of the Inspector General investigation and the on-off-on-off investigation of Mack. All this smacks of cover up. No cover up would be needed, of course, if the Four could speak the truth. In sum, it matters little which approach you take to the evidence. Each leads to the same conclusion: the Four fired me for questioning their decision to give Mack favored treatment.

I will briefly discuss the first two approaches below. The third approach—the Four's credibility—is laced into my responses to follow up questions from Senator Grassley. The last approach—the SEC's cover up—was addressed in my written testimony before your Committee.

The first approach focuses on three events which the Four cite as examples of my "resistance to supervision." The Four and their counsel had countless verbal and written exchanges between my supervisors and me from which they could select some incident to support their allegation. For example, there were more than a thousand email exchanges between my supervisors and me. Surely, if this allegation were true, the Four and their counsel would be able to find at least one incident where I had resisted "reasonable supervision" They could not.

The Four chose three encounters with my supervisors which they describe as follows: (1) I was "unhappy" with Charles Cain's "ministerial" edits to the Formal Order Memorandum in October 2004,[6] (2) my alleged "inaccurate" description of "Commission policy in communicating with defense counsel" caused by "failing to consult with [my] branch chief,"[7] and (3) my issuance of subpoenas without my supervisor's "review or approval" and "but for ... [my] supervisors' corrective actions ...would have been extremely damaging to the SEC."[8] Apparently, they thought it would be their word against mine. They were only half right; it is also their word against the contemporaneous emails which were generated when each event occurred.

Each of the three allegations was the subject of a specific question by Senator Grassley. To avoid unnecessary repetition, I respectfully refer you to those portions of my response that address the three allegations.[9] Beyond that, the emails to and from my supervisors establish that I

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[6] *Id.*

[7] See August 1, 2005, "reevaluation", Ex. 95.

[8] *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity:* Hearing Before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Linda Thomsen, Director of Enforcement, U. S. Securities and Exchange Commission, Washington, DC). (Hereinafter, Thomsen's Written testimony).

[9] I responded to these allegations as follows: to the allegation that "I was "unhappy" with Charles Cain's "ministerial" edits to the Formal Order Memorandum at pages 46-47 of my responses to Senator Grassley questions, to the allegation that I made an "inaccurate" statement of "Commission policy in communicating with defense counsel" by "failing to consult with [my] branch chief" at pages 40-42 of my responses to Senator Grassley questions, and that I issued subpoenas without my supervisor's "review or approval" and "but for ... [my] supervisors' corrective actions ...would have been extremely damaging to the SEC " at pages 48-50 of my responses to Senator Grassley questions.

sought their approval, and followed their guidance, on every significant aspect of the PCM investigation,[10] even on the occasion that I disagreed with them.[11]

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[10] For example, see the following emails: See September 22, 2004, email from Aguirre to Cain, Ex. 3; October 6, 2004, email from Aguirre to Cain, Ex. 4; October 8, 2004, email from Aguirre to Grime and Cain, Ex. 5; October 13, 2004, email from Aguirre to Cain, Ex. 6; October 14, 2004, email from Aguirre to Grime and Cain, Ex. 7; November 3, 2004, email from Aguirre to Grime, Cain and Foster, Ex. 8; December 6, 2004, from Aguirre to Foster, Ex. 9; December 8, 2004, email from Foster to Aguirre, Ex. 10; December 9, 2004, email from Aguirre to Foster, Ex. 11; December 10, 2004, email from Aguirre to Foster, Ex. 12; January 10, 2005, email from Aguirre to Grime and Cain, Ex. 13; January 10, 2005, email from Aguirre to Cain, Ex. 14; January 24, 2005, email from Aguirre to Kreitman, Ex. 15; January 25, 2005, email from Aguirre to Hanson, Ex. 16; February 3, 2005, email from Kreitman to Hanson and Aguirre, Ex. 18; February 4, 2005, email from Aguirre to Kreitman, Ex. 19; February 8, 2005, email from Aguirre to Kreitman and Hanson, Ex. 20; February 14, 2005, email from Kreitman to Hanson and Aguirre, Ex. 21; February 16, 2005, email from Hanson to Aguirre, Ex. 22; February 16, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Ivarone, Plimpton, and Snively, Ex. 23; February 18, 2005, email from Aguirre to Hanson, Ex. 24; February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 25; February 22, 2005, email from Aguirre to Hanson, Kreitman, Foster, and Ribelin, Ex. 26; February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin and Aguirre, Ex. 27; February 25, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 28; March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29; March 9, 2005, email from Aguirre to Hanson and Kreitman, Ex. 30; March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson, Ex. 31; March 15, 2005, email from Aguirre to Hanson, Kreitman, Ribelin, Conroy, Glascoe, and Foster, Ex. 32; March 16, 2005, email from Aguirre to Hanson, Foster, Ribelin, Conroy, Ivarone, and Plimpton, Ex. 33; March 16, 2005, email from Aguirre to Kreitman, Hanson, Plimpton, Ivartone, Foster, Conroy and Ribelin, Ex. 34; March 18, 2005, email from Aguirre to Hanson and Kreitman; Ex. 35; March 29, 2005, email from Aguirre to Hanson and Ribelin, Ex. 36; April 13, 2005, email from Aguirre to Hanson, Ex. 37; April 18, 2005, email from Aguirre to Hanson, Ex. 38; April 22, 2005, email from Aguirre to Hanson and Kreitman, Ex. 39; April 29, 2005, email from Aguirre to Hanson, Ex. 40; May 6, 2005, email from Aguirre to Hanson, Ex. 41; May 9, 2005, email from Aguirre to Florschutz, Kreitman and Hanson, Ex. 42; May 10, 2005, email from Aguirre to Kreitman and Hanson, Ex. 43; May 18, 2005, email from Aguirre to Hanson, Ex. 44; May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Eichner and Conroy, Ex. 45; May 24, 2005, email from Aguirre to Hanson, Foster, Ribelin, Eichner, O'Rourke, Ivarone and Kreitman, Ex. 46; May 24, 2005, email from Aguirre to Hanson, Ex. 47; May 25, 2005, email from Aguirre to Hanson, Ex. 48; June 3, 2005, email from Aguirre to Ribelin, Foster, Eichner, Conroy, Glascoe, Miller, Hanson and Kreitman, Ex. 49; June 2, 2005, email from Aguirre to Kreitman, Ex. 50; June 12, 2005, email from Aguirre to Hanson, Ex. 51; June 10, 2005, email from Aguirre to Ribelin, Hilton, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke, Ex. 52; June 12, 2005, email from Aguirre to Hanson, Ex. 53; June 20, 2005, email from Aguirre to Hanson, Ex. 54; June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 55; June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin, Ex. 56; June 29, 2005, email from Aguirre to Kreitman, Ex. 57; July 29, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Eichner and Jama, Ex. 58; July 27, 2005, email from Aguirre to Berger and Kreitman, Ex. 59; August 24, 2005, email from Aguirre to Berger; August 4, 2005, email from Aguirre to Hanson, Ex. 60; February 9, 2005, email from Aguirre to Kreitman and Hanson, Ex. 64; Early May email chain between Kreitman, Hanson and Aguirre, Ex. 89; May 11, 2005, email from Hanson to Aguirre, Ex. 90; August 25, 2005, email from Aguirre to Hanson, Jama, Eichner and Ribelin, Ex. 101; June 3, 2005, email from Eichner, to Kreitman, Aguirre, and Hanson, Ex. 105; March 11, 2005, email from Kreitman to Aguirre and Hanson, Ex. 107; March 15, 2005, email from Hanson to Aguirre, Ex. 108; March 15, 2005, email from Kreitman to Hanson, and Aguirre, Ex. 109; August 4, 2005, email from Aguirre to Hanson, Eichner, Jama, Ribelin, and Miller, Ex. 118; August 26, 2005, email from Aguirre to Kreitman, Hanson, Eichner, Ribelin, and Jama, Ex. 119; May 26, 2005, email from Aguirre to Hanson, Ex. 121; May 24, 2005, email exchange between Aguirre and Hanson, Ex. 124; May 26, 2005, email from Thomas Sporkin to Aguirre, Ex. 125; and May 26, 2005, email from Sporkin to Aguirre, Ex. 126; Chain of emails in late August 2005, Ex. 133; June 2, 2005, email from Aguirre to Kreitman Ex. 140; June 3, 2005, email from Aguirre to Hanson, Ex. 141; June 3, 2005, email from Eichner to Kreitman, Hanson, and Aguirre, Ex. 142; June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre, Ex. 143; and August 24, 2005, email from Kreitman, to Aguirre and Hanson, Ex. 145.

[11] See March 14, 2005, email from Aguirre to Kreitman and Hanson, Ex. A.

The second approach focuses on the Four's abrupt reversal of their positive evaluations of my performance. The timeline speaks for itself:

June 1, 2005	My supervisors find my performance acceptable
June 29, 2005	Hanson said my contributions were of high value
July18, 2005	Compensation committee with Berger give two step rating increase
After July 18	Thomsen approves merit step increases
July 22	I inform Berger of Hanson's statement when he blocked the Mack subpoena
July 27	My email to Berger again questions whether Mack received favored treatment
August 1	Berger, Kreitman and Hanson do "reevaluation"
September 1	The Four terminate my employment

As indicated in the above timeline, Berger, as a member of the compensation committee, approved my two-step merit increase on July 18. Less than two weeks later, he initiated the "reevaluation." No one has suggested that anything happened between July 18 and August 1 that would warrant the "reevaluation." In the absence of any real intervening event, Berger had to create one. He manufactured one that nobody would be able to contradict, since he was the only witness. The event took place only in Berger's mind. He testified: "I noted though, that the *draft* evaluation did not contain any constructive criticism. (Emphasis added)."[12] So Berger "noted"? When did he make this mental note? Hanson circulated his evaluation on June 29, which would have gone to Berger. Berger should have "noted" that my supervisors' evaluation needed some constructive criticism sometime before or during July 18, when he, as a member of the compensation committee, decided to approve my two-step rating increase. But Berger did not make his mental note for almost another two weeks. Then the need for "constructive criticism" in my evaluation just floated into his head sometime around August 1.

I submit that two concrete events, not Berger's delayed mental processes, triggered the "revaluation." Between the compensation committee meeting on July 18 and the August 1 "reevaluation," I had two communications with: my face-to-face meeting with him on July 22 and my email to him on July 27. Both communications questioned the decision to give Mack favored treatment.

To sum up, there are at least four ways to view the evidence. Each points to the same conclusion. Collectively, these four approaches conclusively establish that the Four terminated my employment for questioning their decision to give Mack favored treatment.

2. **Mr. Aguirre you appear to allege in the New York Times article that Mr. Mack's campaign contributions to the President may have played a role in the SEC's reluctance**

[12] Berger's written testimony.

to take his testimony. However, in Mr. Berger's testimony at page 11, he notes that during his tenure at the SEC "it was publicly reported that the Enforcement Division vigorously investigated cases involving the then Governor of Texas, the Vice President of the United States, and the Majority Leader of the Senate, all Republicans." How do you square your theory of political pressure impeding an SEC investigation with these examples of SEC vigor in investigations?

I believe you are referring to a New York Times article on June 23, 2006, which reported on my May 30, 2006, letter to the Senate Subcommittee on Securities and Investment. My letter summarized the facts, as I experienced them, during the last week of June 2005, when the investigation of John Mack was effectively closed down.[13] That process began on approximately June 23, 2005, when Hanson blocked the issuance of a subpoena for Mack, stating only that Mack had powerful political connections. As explained in my May 30, 2006, letter, and in my testimony before your Committee, other facts corroborated Hanson's statement.

Berger's argument employs a faulty syllogism: the SEC has "vigorously" investigated a Republican Texas governor, a Republican Vice President, and a Republican Senate Majority Leader despite their political clout; Berger was a part of the same SEC leadership; therefore, Berger was not influenced by Mack's political clout with a Republican president. Only one aspect of this syllogism is valid: Berger was a part of the same SEC leadership. As discussed below, every other aspect of this syllogism is flawed. Those flaws include its primary premise: the SEC "vigorously" investigated a Republican Texas governor, a Republican Vice President, and a Republican Senate Majority Leader.

But there is a preliminary issue that should be addressed before turning to the flaws in Berger's logic. The point of Berger's faulty syllogism is to demonstrate that the Enforcement Division does not buckle under to political influence. Hanson has lent support to this theory. While Hanson concedes telling me about Mack's "political clout" as a reason for blocking the subpoena to Mack, he claims that he "inartfully" chose his words. "Political" did not really mean political. How could it? After all, Hanson knew nothing about Mack being a "Pioneer" or any of his other political connections.[14]

I submit that accepting Hanson's redefinition of "political" matters little in assessing whether the SEC has acted contrary to federal regulations and its mission. Nor does Berger's statement that the SEC has "vigorously" investigated those with political clout in the past. Assume *arguendo* that none of the Four had any knowledge that Mack, with one other, was at the top of the President's list for appointment as the next Secretary of the Treasury. How would these assumptions change the significance of the Four's decision to block the Mack subpoena? It would mean that Hanson blocked the subpoena of the suspected tipper, who he considered to be a "bad guy," because he was a member of the Wall Street elite. And the rest of the Four went

[13] I made no statement to The New York Times in connection with that article.

[14] *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity:* Hearing Before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Robert Hanson, Branch Chief Division of Enforcement, U. S. Securities and Exchange Commission, Washington, DC) (Hereinafter, Hanson's written testimony).

along with it. Giving favored treatment, whether to those with political influence or to Wall Street elite, violates federal regulations defining how the SEC must operate.[15]

Returning now to Berger's logic, his primary premise is faulty. He cites the SEC's "vigorous" investigations of a Texas Governor (George W. Bush),[16] a Vice President (Dick Cheney), and a Senate Majority Leader (Bill Frist). The obvious implication is that high level investigations such as these prove a broader principle—the SEC is above political influence and therefore so is Berger. It is hard to reconcile that notion with the recent public statements of a former SEC Chairman. In his January 2006 editorial, former SEC Chairman Arthur Levitt admitted to buckling under to political pressure. He wrote:

> Indeed, because many of the issues before the SEC were far from the front of the public's mind, the influence of high-priced lobbyists on the system was easy to detect and especially brazen. From battles over auditing reforms to the expensing of stock options, the concerns of ordinary investors often were subsumed to the interests of industry lobbyists by Republicans and Democrats alike ... In addition to making thousands of dollars in campaign donations, companies would concoct phony "grass-roots" coalitions—usually made up of executives and compliant employees—to rally for the cause and pressure lawmakers. And when all else failed, lobbyists would cash in their chits with members of relevant House and Senate committees to threaten the SEC—an independent regulatory agency—with budget cuts to get what they wanted. Regrettably, I occasionally found myself succumbing to this immense pressure in order to save the commission. Many of the reforms that were thwarted in this way could have saved investors some of the pain from the scandals of the past five years.[17]

Of course, the former chairman was discussing how political pressure had influenced the SEC's rule making authority, not its enforcement of existing securities laws. Still, he conceded that political pressure had caused the SEC to act to the detriment of the investors the SEC was created to protect. Further, federal regulations require the SEC rule-making procedures to be free of such influence,[18] just as other regulations require that its enforcement of the securities laws be free from such influence.

Similar concerns surfaced during Berger's tenure whether the Enforcement Division has also marched to the drum beat of those wielding political influence. In 2000, the SEC opened an investigation of Representative Lazio while he was running for the Senate against Hillary Clinton. According to The Washington Post, the letter from a "Clinton ally" to SEC Chairman Levitt, who admitted above to succumbing to political pressure, prompted the probe. President Clinton appointed Chairman Levitt. Two of the three examples given by Berger—the investigation of George W. Bush and the investigation of Dick Cheney—were also embroiled in the same type of controversy.

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[15] 17 C.F.R. 200.55, 17 C.F.R. 200.58, 17 C.F.R. 200.61, 17 C.F.R. 200.64, 17 C.F.R. 200.67, 17 C.F.R. 200.69, 17 C.F.R. 200.735-2(a), (17 C.F.R. 200.735-2(b), and 17 C.F.R. 200.50; 17 C.F.R. 200.51).

[16] The only person who I have been able to identify who was the subject of an SEC investigation and also served at some time in his life as the Texas governor was George W. Bush.

[17] Arthur Levitt Jr., *Cutting the Corruption*, Was. Post, January 23, 2006, at A15.

[18] 17 C.F.R. 200.58: 17 C.F.R. 200.61 17 C.F.R. 200.67.

I am not suggesting that any of these political leaders violated the law. Nor am I suggesting political influence dictated the outcome of the SEC's investigation. Only the senior SEC officials who directed those investigations know the truth. My point is different. From what is known publicly, the SEC's handling of these three cases provides little proof that the SEC was above political pressure.

In citing the SEC investigation of a Texas governor, Berger must have in mind the investigation of George W. Bush (Bush), which the SEC opened in 1991 and closed in April 1993. To begin with, Bush was not the Texas governor at any time during the investigation. He became governor in 1995. Hence, the SEC never investigated a Texas governor. The SEC's handling of this investigation, however, has been the subject of widespread criticism. The SEC opened its investigation on April 5, 2001[19] the day *after* The Wall Street Journal reported that Bush, the President's son, had made a late filing of an SEC form.[20] The Journal's article (Bush's Son Misses Deadline for Reporting 'Inside' Sale) read in part: "George W. Bush, eldest son of the president, reported a large 1990 'insider' sale of stock last month, almost eight months after the federal deadline for disclosing such transactions." The timely sales avoided a loss of approximately $350,000. Under these circumstances, the SEC would have faced a firestorm had it not opened an investigation.

Many have speculated that political influence caused the SEC to close the insider trading investigation of Bush.[21] As in Mack's case, one factor contributing to that speculation was the SEC's failure to interview Bush, the subject of the insider trading investigation.[22] Another factor raising concern was the SEC's letter "to Mr. Bush's lawyer - *a rare action by the agency*— informing him that "no enforcement action [was] contemplated with respect to [Mr. Bush.] (emphasis added)." [23] The SEC of course did the same in the GE-Heller matter. I am not suggesting that the SEC buckled to political pressure or that the subject of the investigation violated the law. But I do say this: the SEC's investigation of a "Texas governor" in 1993 raises

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[19] John Dunbar, A Brief History of Bush, Harken and the SEC, http://www.publicintegrity.org/report.aspx?aid=196.

[20] *Bush's Son Misses Deadline for Reporting "Inside" Sale*, Wall St. J., April 4, 1991 at A4. "George W. Bush, eldest son of the president, reported a large 1990 "insider" sale of stock last month, almost eight months after the federal deadline for disclosing such transactions."

[21] Wikipedia reports: "The investigation [by the SEC] was criticized on several grounds, including the fact that the subject of the inquiry, Bush, was never interviewed by the SEC. A pertinent point here is that the SEC Commissioner had been appointed by President George H. W. Bush Sr., and its counsel had worked for Bush Jr. negotiating the purchase of the Texas Rangers; Also, Paula Dwyer, *The Ghosts That Won't Go Away, Scandals in Corporate America*, BUS. WEEK, July 22, 2002, at 34.

[22] *Id.* Also,

> The president's self-contradictory defense of his past is to say he was "fully vetted" by the S.E.C. even though he still hasn't "figured it out completely" himself. But the S.E.C. never interviewed Mr. Bush during its investigation. The agency was then run by an appointee of his father, Richard Breeden, who recused himself from the case

Frank Rich, *The Road to Perdition*, N.Y. TIMES July 20, 2002, at A1

[23] Charlotte-Anne Lucas, *Bush to Reveal Documents from SEC Inquiry; GOP Challenger Denies Insider Trading with Harken Energy Stock*, The Dallas Morning News, October 11, 1994, at 22D. Also, Michael Schroeder, *SEC Says Lazo Committed No Violations*, W. St. J. August 24, 2000, at A24.

questions, but provides no answers. Hence, it hardly proves that the SEC is beyond political influence.

Berger's reliance on the SEC's investigation of Halliburton and its staff interview of Vice President Cheney is equally misplaced. That investigation was again engulfed in criticism,[24] allegations, and denials,[25] mostly denials, that political influence had dictated its outcome. Before the SEC filed its action, several private securities fraud cases sued Halliburton and certain officers and directors. In the absence of any SEC proceeding, Judicial Watch sued the Vice President and Halliburton for fraud. Subsequently, after considerable public outcry, the SEC took Vice President Cheney's testimony.[26] The public concern that political influence might dictate the outcome led Chairman Donaldson to issue a statement: "Donaldson pledged to protect the independence of the SEC from political pressure from the White House or Congress, and to allow the agency's enforcement division to vigorously pursue investigations."[27] Why would it take the "pledge" of the SEC Chairman to protect the SEC from political influence if it was not susceptible to it?

Finally, Berger has alluded to the SEC's ongoing investigation of Senator Bill Frist. As with the investigations of George Bush and Dick Cheney, the facts triggering the investigation of Senator Frist were quite public. The Senator's SEC filings disclosed heavy trading shortly before a disappointing earnings announcement.[28] Once again, a public outcry pressed the SEC to look into the matter. As one industry journal put it: "Consumer groups are rattling the cage, demanding an investigation into the Tennessee lawmaker's sale of shares in the for-profit hospital chain HCA just before the release of a disappointing second-quarter report sent the stock price reeling."[29] One of those consumer groups began to publicly question Senator Frist's holdings in September 2005.[30] The SEC would again face a firestorm if it did not look into the matter.

In sum, none of the SEC investigations demonstrate the SEC is free of political influence. In each case, the facts requiring the investigation were public. How does the SEC not investigate a high political figure when public documents demonstrate that he may have violated the securities laws? The SEC's handling of the Mack investigation demonstrates the same principle. The SEC blocked that investigation until two Senate committees opened their own investigations

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[24] "But the settlement [between the SEC and Halliburton] could stoke criticism. The accounting change was initiated while Mr. Cheney was at the company, and Mr. Morris was promoted to chief financial officer under Mr. Cheney's watch. Calls seeking comment from Mr. Cheney weren't returned." Russell Gold, *Halliburton Settles SEC Probe into an Accounting Disclosure, Company to Pay a $7.5 Million Penalty,* W. ST. J., August 3, 2004, at B2.

[25] James Toedtman and Mark Harrington, "'The SEC is completely unreactive to any effort to generate any kind of political pressure,'" said McLucas. 'It will not have any influence.'" NEWSDAY, May 30, 2002, at 2. Also, White *House Dismisses Cheney Suit as "Without Merit",* Agence France Presse—English, July 10, 2002.

[26] Christopher Bowe, SEC *Steps Up Halliburton Investigation Regulation Formal Probe Launched into Accounting and Disclosure Practices While Dick Cheney Was Chief Executive,* FIN. TIMES (London, England), December 21, 2002, at p. 18.

[27] Kathleen Day, *Audit Post Top Priority For SEC Pick; Two Key Senators Back Donaldson,* WAS. POST, February 6, 2003, at E1.

[28] *Frist: Sec Investigating Sale of HCA Stock,* AMERICAN HEALTH LINE, September 23, 2005.

[29] Bill Straub, *Frist's Stock Sale Places Him Under Ethical Cloud,* Scripps Howard News Service, September 28, 2005.

[30] *Id.*

and, when that fact became public through the media, the SEC reopened both its SEC investigation and its OIG investigation. This does not prove the SEC is above political influence; it merely proves the SEC is politically astute.

But even if Berger's premises are accepted as fact, the logic is faulty. That other senior SEC officials vigorously prosecuted cases against those with political clout does not mean that Berger was ready to do the same. In effect, Berger has wrapped himself in the SEC flag. I submit he has done so because the facts of his involvement in blocking the Mack subpoena and the cover up are so damning. In my presence, and without knowing the evidence, he told Kreitman and Hanson on June 23 that the investigation of Mack was headed no where. From that point, Hanson and Kreitman reversed their support for the Mack investigation. Only Berger could follow up with the Morgan Stanley head of compliance. When I told Berger that Hanson had expressly blocked the Mack subpoena because of Mack's political influence, Berger did nothing to look into those allegations. He did, however, direct Hanson and Kreitman to create the "reevaluation." In September, it was Berger who told Kreitman to add the phony evaluation to my personnel files. Every charge Berger has made has been refuted with documentary evidence. Given these facts, Berger has one option left: wrap himself in the SEC's legacy and hope for the best.

3. **Mr. Aguirre, on page 13 of Mr. Berger's written testimony he describes a call you previously testified about in which Mr. Kreitman reports a call from in-house counsel at Morgan Stanley inquiring about Mr. Mack's exposure and writes, "To the extent Mr. Aguirre testified that I indicated a view on the merits, and that the view was that evidence indicated that Mr. Mack could not be complicit in any wrongdoing, that testimony is false." How do you respond to Mr. Berger's concern that telling Morgan Stanley anything about Mr. Mack's potential exposure would have violated SEC regulations and unlawfully impinged upon a business decision?**

I do not dispute Berger's contention that telling Morgan Stanley anything about Mack's potential exposure may have violated SEC policy or its regulations. For that reason, I told Morgan Stanley's head of compliance that I would refer his question—was the serious SEC about Mack?—to my supervisors. I also do not question Kreitman's initial response that we should say something to Morgan Stanley. Nor did Hanson question it. Berger's decision that nothing should be said was fine with me as well. To use a colloquialism, I had no dog in this fight.

But the discussion about SEC policy is collateral to two primary issues. What did Berger say to Morgan Stanley's representatives, Mack, or Mack's counsel? Neither Kreitman, nor Hanson, nor I followed up with Morgan Stanley's compliance officer after the Berger call. Berger testified that he handled the matter. That raises issues: Did Berger hint in any way what evidence the SEC held or did not hold? Did Berger hint in any way that the SEC's evidence was not sufficient to proceed against Mack? For some reason, Morgan Stanley felt comfortable in moving ahead with Mack on June 30, despite the fact its compliance officer told me a week earlier that a serious investigation could affect Morgan Stanley's decision to hire Mack as its CEO. It also seems odd that the Morgan Stanley board, knowing that Mack was the subject of an SEC insider trading investigation, would roll the dice by asking him back. It could face a potential shareholders derivative action if it hired Mack without some assurance that the risk was

minimal or nonexistent. What would be the board's defense six months later if Mack was forced to resign and, consequently, the Morgan Stanley stock plunged costing shareholders billions?

But Berger's entire answer is in its essence a straw man. The key point of my testimony is that Berger cut off Kreitman in mid-sentence just as Kreitman was saying that we would likely file a case against Mack. Berger does not address my testimony. Instead, he creates a straw man by attributing his words to me: "To the extent Mr. Aguirre testified that I indicated a view on the merits and that the view was that the evidence indicated that Mack could not be complicit in any wrongdoing..."[31] Having set up the straw man, Berger then knocks it down: "that testimony is false."[32]

I have never contented or even hinted that Berger "indicated a view on the merits." Indeed, I testified before your committee on June 28, 2006, that Berger likely knew nothing about the facts pointing to Mack as the possible tipper.[33] It was his lack of knowledge about the Mack case combined with his abrupt directive to Kreitman—that no case would likely be filed against Mack—that was stunning. Again, the key Kreitman-Berger conversation unfolded:

> Kreitman: I think we will likely file against Mack and...
>
> Berger (cutting in): I don't think we are going to file and nothing should be said to Morgan Stanley.

Why did Berger think that no case would be filed against Mack without knowing any of the evidence? The answer is simple: the evidence did not matter; the decision was made on other grounds.

4. There have been a number of things said about your performance and conduct while working at the SEC. Would you like to respond to these characterizations of your work?

Senator Grassley asked me to respond to twenty-three separate allegations by the Four regarding my performance. In reviewing Hanson's testimony, I found three additional allegations that were not included in Senator Grassley's questions: [1] "Mr. Aguirre became angry and abrasive whenever an investigative decision was made that he did not agree with, [2] yet on at least one occasion the same idea he rejected dismissively when made by another attorney became an idea Mr. Aguirre later presented as his own. [3] In early July 2005, he told me that he could no longer even talk to Mark Kreitman, our group's Assistant Director."

Hanson's statement that I was "angry and abrasive whenever an investigative decision was made that he did not agree" is nonsense. As with his other accusations, he offers no concrete

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[31] Berger's written testimony.

[32] *Id.*

[33] The Lexis version of my June 28 testimony on this point reads: "Well, the information that I passed along customarily when--when Mr. Berger was apprised, I would be asked to -- to prepare something. Mr. Berger had not participated in any meetings. I had not -- most of the conversations I had were verbal, and I think he said something during the phone conversation that implied that he was not that familiar with the facts of the case, and the facts that I'm talking about had been developed in the last, oh, three or four weeks."

example, much less any evidence, to support this charge. There were relatively few occasions when I disagreed with my supervisors. I did, however, have one such disagreement on March 11 regarding the content of a letter that would be sent to opposing counsel following a telephone conference on March 10. Two drafts of the letter were circulated. I circulated an email on March 14 explaining why I thought my draft more thoroughly and concretely addressed the issues resolved during the call. My email opened with this comment:

> Overview
>
> First, I recognize that it is your responsibility to make the decisions in this case. I also know both of you are very busy and this is a new matter for you. However you decide to proceed, I will accept your guidance. In this spirit, for the reasons below, I believe the current draft confirming last Thursday's call should not be sent in its current form.[34]

I then gave an overview of my reasons and then returned back to the opening theme:

> For these reasons, I think the language in my proposed draft of March 11 better addresses the issues than the current one. *But if you guys disagree with me, I will carry out your instructions with alacrity* (emphasis added).[35]

This was my approach in dealing with my supervisors on all issues, except the occasion where Cain told me to misstate facts in the Formal Order Memorandum. I politely told him in a face-to-face meeting and by email that I could not follow that directive.[36] The reason Hanson cites no examples—despite his proclivity to take notes—is quite simple: there were none.

Hanson's statement that I rejected another staff member's idea and then claimed it as my own never happened. Once again, Hanson offers nothing concrete much less any supporting documents. I actively sought out other staff's ideas and made a special effort to recognize their work when it helped advance the investigation.[37] In his evaluation of my performance, Hanson himself recognized that I had worked effectively with staff from the Office of Compliance, Inspections and Examinations and staff from various SRO's in advancing the investigation.[38]

Finally, Hanson's statement that I told him in early July that I could no longer even talk to Mark Kreitman again distorts the truth. I told Hanson that I had tried to discuss the evidence supporting the issuance of the subpoena to Mack on June 28 and June 29, but he refused to discuss the matter with me. I testified to one of those conversations during my June 28, 2006, testimony before your committee. In terms of communicating with Kreitman, I met with him on July 5 on the PCM investigation,[39] followed through on an assignment he gave me on July 12,[40]

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[34] See March 14, 2005, email from Aguirre to Kreitman and Hanson, Ex. A.
[35] *Id.*
[36] See October 8, 2004, email from Aguirre to Richard Grime and Cain, Ex. 5.
[37] See for example December 29, 2004, email from Aguirre to Scott Plimpton, Ex. B, after he created a valuable Excel spreadsheet from data obtained late from the opposing attorney shortly before important testimony
[38] Robert Hanson's June 2005 evaluation of Gary Aguirre's performance and transmittal sheet, Ex. 2.
[39] See June 30, 2005, email from Kreitman to Hanson, Eichner, Jama, and, Aguirre, Ex. C.
[40] See July 12, 2005, email from Aguirre to Kreitman and Hanson, Ex. D.

and went to his summer "bash" with my wife on July 17.[41] I also updated him on recent developments on the investigation on July 5,[42] July 7,[43] and July 14.[44]

[41] See July 7, 2005, email from Kreitman to Charles Davis, Jacqueline Eggert, Jim Eichner, Dave Fielder, Robert Hanson, Liban Jama, Herbert Martin, Amy Miller, Janene Smith, Robert Swanson, Jason Tankel, Stephen Van Meter, Constance Williams, David Witherspoon, Paul Berger, Nancy Miller Jessica Lo, and Gary Aguirre, Ex. E.

[42] See July 5, 2005, email from Aguirre to Hanson, Kreitman, Eichner, and Jama, Ex. F.

[43] July 7, 2005, email from Aguirre to Hanson and Kreitman, Ex. G.

[44] See July 14, 2005, email from Kreitman to Hanson, Eichner, O'Rourke, Ribelin, Jama and Aguirre, Ex. H.

Exhibit	Description
1	SEC Form 2494
2	Robert Hanson's June 2005 evaluation of Gary Aguirre's performance and transmittal sheet.
3	September 22, 2004, email from Gary Aguirre to Charles Cain.
4	October 6, 2004, email from Aguirre to Cain. Only page 2 of the Formal Order Memorandum, with the relevant language, is enclosed.
5	October 8, 2004, email from Aguirre to Richard Grime and Cain.
6	October 13, 2004, email from Aguirre to Cain.
7	October 14, 2004, email from Aguirre to Grime and Cain.
8	November 3, 2004, email from Aguirre to Grime, Cain and Hilton Foster.
9	December 6, 2004, from Aguirre to Foster.
10	December 8, 2004, email from Foster to Aguirre.
11	December 9, 2004, email from Aguirre to Foster.
12	December 10, 2004, email from Aguirre to Foster.
13	January 10, 2005, email from Aguirre to Cain.
14	January 10, 2005, email from Aguirre to Grime and Cain.
15	January 24, 2005, email from Aguirre to Mark Kreitman.
16	January 25, 2005, email from Aguirre to Hanson.
17	May 25, 2005, letter from Aguirre to Bloomberg's attorney.
18	February 3, 2005, email from Aguirre to Hanson and Kreitman.
19	February 4, 2005, email from Aguirre to Kreitman.
20	February 8, 2005, email from Aguirre to Kreitman and Hanson.
21	Kreitman's February 14, 2005, email from to Hanson and Aguirre.
22	Hanson's February 16, 2005, email to Aguirre.
23	February 16, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Jason Ivarone, Scott Plimpton, and Brian Snively.
24	February 18, 2005, email from Aguirre to Hanson.
25	February 18, 2005, email from Aguirre to Hanson and Kreitman.
26	February 22, 2005, email from Aguirre to Hanson, Kreitman, Foster, and Ribelin.
27	February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin and Aguirre.
28	February 25, 2005, email from Aguirre to Hanson, Ribelin, Foster and

Kreitman.

29 March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman.

30 March 9, 2005, email from Aguirre to Hanson and Kreitman.

31 March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson.

32 March 15, 2005, email from Aguirre to Hanson, Kreitman, Ribelin, Thomas Conroy, Stephen Glascoe, and Foster.

33 March 16, 2005, email from Aguirre to Hanson, Foster, Ribelin, Conroy, Ivarone, and Plimpton.

34 March 16, 2005, email from Aguirre to Kreitman, Hanson, Plimpton, Ivarone, Foster, Conroy and Ribelin.

35 March 18, 2005, email from Aguirre to Hanson and Kreitman.

36 March 29, 2005, email from Aguirre to Hanson and Ribelin.

37 April 13, 2005, email from Aguirre to Hanson.

38 April 11, 2005, email from Aguirre to Hanson.

39 April 22, 2005, email from Aguirre to Hanson and Kreitman.

40 April 29, 2005, email from Aguirre to Hanson.

41 May 6, 2005, email from Aguirre to Hanson.

42 May 9, 2005, email from Aguirre to Lesley Florschutz, Kreitman and Hanson.

43 May 10, 2005, email from Aguirre to Kreitman and Hanson.

44 May 18, 2005, email from Aguirre to Hanson.

45 May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, James Eichner and Conroy.

46 May 24, 2005, email from Aguirre to Hanson, Foster, Ribelin, Eichner, O'Rourke, Ivarone and Kreitman.

47 May 24, 2005, email from Aguirre to Hanson.

48 May 25, 2005, email from Aguirre to Hanson.

49 June 3, 2005, email from Aguirre to Ribelin, Foster, Eichner, Conroy, Glascoe, Miller, Hanson and Kreitman.

50 June 2, 2005, email from Aguirre to Kreitman.

51 June 12, 2005, email from Aguirre to Hanson.

52 June 10, 2005, email from Aguirre to Ribelin, Hilton, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke.

53 June 12, 2005, email from Aguirre to Hanson.

54 June 20, 2005, email from Aguirre to Hanson.

55 June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin.

56 June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin.

57 June 29, 2005, email from Aguirre to Kreitman.

58 July 29, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Eichner and Liban Jama.

59 July 27, 2005, email from Aguirre to Paul Berger and Kreitman.

60 August 24, 2005, email from Aguirre to Berger; and Aguirre's August 4, 2005, email to Hanson.

61 December 2, 2004, email from Ribelin to David Wiedekehr, Glascoe and Aguirre.

62 March 2005 chain of emails from Aguirre to Barbara C. Chretien-Dar.

63 December 7, 2004, email from Ribelin to Joseph Cella, Foster, Glascoe and Aguirre.

64 February 9, 2005, email from Aguirre to Kreitman and Hanson.

65 May 20, 2005, email from Aguirre to Hanson.

66 February 27, 2005, email from Kreitman to Hanson, Ribelin and Aguirre.

67 February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin and Aguirre.

68 February 11, 2005, email from Kreitman to Ribelin, Hanson, and Aguirre.

69 October 26, 2005, email from Aguirre to Foster.

70 November 18, 2004, email from Foster to Grime and Aguirre.

71 November 22, 2004, email from Aguirre to Grime, Cain and Foster.

72 November 24, 2004, email from Foster to Aguirre.

73 December 2, 2004, email from Aguirre to Foster.

74 December 7, 2004, email from Foster to Aguirre.

75 December 8, 2004, email from Foster to David Kornblau, Kreitman, Cain and Aguirre.

76 December 8, 2004, email from Aguirre to Foster.

77 December 14, 2004, email from Foster to Aguirre.

78 January 18, 2005, email from Foster to Aguirre.

79 January 31, 2005, email from Foster to Aguirre.

80 February 7, 2005, email from Foster to Aguirre.

81 February 9, 2005, email from Aguirre to Foster and Ribelin.

82 February 14, 2005, email from Aguirre to Foster.

83 February 14, 2005, email from Aguirre to Foster.

84 February 18, 2005, email from Aguirre to Foster.

85 March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster, and Kreitman.

86 August 26, 2005, email from Aguirre to Hanson.

87 February 15, 2005 email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Williams, Conroy, and Ivarone.

88 May 11, 2005, email from Aguirre to Kreitman, Hanson, O'Rourke, Ribelin, and Foster.

89 Early May email chain between Kreitman, Hanson and Aguirre.

90 May 11, 2005, email from Hanson to Aguirre.

91 May 25, 2005 email from Aguirre to Hanson and Hanson's response of the same date.

92 May 23, 2005, email from Florschutz to Aguirre.

93 July 28, 2005, email from Aguirre to Hanson, Jama, Ribelin, and Eichner.

94 Aug 5, 2005, email from Hanson to Aguirre.

95 August 1, 2005, "reevaluation" of Gary Aguirre.

96 September 1, 2005, termination notice.

97 February 22, 2005 email from Kreitman to Foster, Ribelin, Hanson, and Aguirre.

98 July 25, 2005, email from Kreitman to Hanson and Aguirre.

99 November 2, 2004, email from Aguirre to Grime, Cain and Foster.

100 November 3, 2004, email from Aguirre to Grime, Cain and Foster.

101 August 25, 2005, email from Aguirre to Hanson, Jama, Eichner and Ribelin.

102 Thank you note from intern Nancy Miller.

103 May 4, 2005, email from Ribelin to Hanson and Kreitman.

104 May 11, 2005, email from Aguirre to Hanson.

105 June 3, 2005, email from Eichner, to Kreitman, Aguire, and Hanson.

106 July 13, 2005, email from Aguirre to Hanson.

107 March 11, 2005, email from Kreitman to Aguirre and Hanson.

108 March 15, 2005, email from Hanson to Aguirre.

109 March 15, 2005, email from Kreitman to Hanson, and Aguirre.

110 September 21, 2005, email from Aguirre to Delores Ruffin.

111 September 26, 2005, email from Kreitman to Charles Staiger.

112 August 5, 2005 email from Hanson to Aguirre.

113 August 17, 2005, email from Kreitman to Aguirre.

114 August 26, 2005, email from Aguirre to Hanson.

115 SEC Case Closing Recommendation on the Pequot Capital Management investigation.

116 August 03, 2005, email from Eichner to Ribelin, Jama, Hanson, Miller, and Aguirre.

117 August 3, 2005, email from Hanson to Eichner, Aguirre, Jama, Ribelin, and Miller.

118 August 4, 2005, email from Aguirre to Hanson, Eichner, Jama, Ribelin, and Miller.

119 August 26, 2005, email from Aguirre to Kreitman, Hanson, Eichner, Ribelin, and Jama.

120 May 24, 2005, chain of emails between Aguirre and O'Rourke.

121 May 26, 2005, email from Aguirre to Hanson.

122 January 10, 2005, letter from Aguirre to Berger.

123 May 23, 2005, email from Aguirre to Hanson.

124 May 24, 2005, email exchange between Aguirre and Hanson.

125 May 26, 2005, email from Thomas Sporkin to Aguirre.

126 May 26, 2005, email from Sporkin to Aguirre.

127 August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman,

128 August 17, 2005, email from Aguirre to Jama and Eichner

129 August 24, 2005, email from Aguirre to Kreitman and Hanson.

130 August 24, 2005, email from Hanson to Aguirre.

131 January 2005 chain of emails between Grime, Aguirre and others.

132 June 9, 2005, chain of emails between Eichner and Aguirre.

133 Chain of emails in late August 2005.

134 April 2005 chain of emails between Aguirre and Brian Murphy

135 February 8, 2005, email from Brian Snively to Aguirre, Lidian Pereira, Mavis Kelly, and Kathryn Breffitt.

136 September 27, 2004, email chain between Peter Simonyi and Aguirre.

137 November 2004 email chain between Peter Simonyi and Aguirre.

138	January 8, 2007, declaration of Susan Markel.
139	See May 31, 2005, email from Aguirre to Hanson and Kreitman
140	June 2, 2005, email from Aguirre to Kreitman.
141	June 3, 2005, email from Aguirre to Hanson.
142	June 3, 2005, email from Eichner to Kreitman, Hanson, and Aguirre.
143	June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre.
144	August 23, 2005, email from Aguirre to Hanson and Kreitman.
145	August 24, 2005, email from Kreitman, to Aguirre and Hanson.
146	June 20, 2005, email from Aguirre to Hanson and Kreitman.
147	May 31, 2005 letter from Aguirre to Audrey Strauss.
148	February 4, 2005, staff meeting notes.
149	October 22, 2004, email from Aguirre to Cain.
150	May 31, 2005, letter from Aguirre to Reuters's attorney.
A	March 14, 2005, email from Aguirre to Kreitman and Hanson.
B	December 29, 2004, email from Aguirre to Scott Plimpton.
C	June 30, 2005, email from Kreitman to Hanson, Eichner, Jama, and, Aguirre.
D	July 12, 2005, email from Aguirre to Kreitman and Hanson
E	July 7, 2005, email from Kreitman to Charles Davis, Jacqueline Eggert, Jim Eichner, Dave Fielder, Robert Hanson, Liban Jama, Herbert Martin, Amy Miller, Janene Smith, Robert Swanson, Jason Tankel, Stephen Van Meter, Constance Williams, David Witherspoon, Paul Berger, Nancy Miller Jessica Lo, and Gary Aguirre.
F	July 5, 2005, email from Aguirre to Hanson, Kreitman, Eichner, and Jama.
G	July 7, 2005, email from Aguirre to Hanson and Kreitman.
H	July 14, 2005, email from Kreitman to Hanson, Eichner, O'Rourke, Ribelin, Jama and Aguirre.

U. S. Securities and Exchange Commission
Performance Plan and Evaluation

Name	From		To	
Aguirre, Gary J.	Month	Year	Month	Year
	10	2004	04	2005
Title	**Period Covered by this Evaluation**			
General Attorney(s)	☐ Entire Performance Evaluation Period			
Division/Office/Field Office	☐ Detail (From:_____To:_____)			
Enforcement				
Pay Plan, Series, Grade, Step	☐ Other (specify)_____			
SK-0905-14-24				

Employee Signature	Date 11/1/04
Supervisor/Rating Official Signature	Date
Employee Signature	Date
Supervisor/Rating Official Signature	Date 11/1/04
Employee Signature	Date 6/1/05
Supervisor/Rating Official Signature	Date 6/1/05

☒ Acceptable ☐ Unacceptable

SEC 2494 (5/03)

Critical Elements and Acceptable Standards	Results	
	Acceptable	Unacceptable
Knowledge of Field or Occupation - Maintains and, with few exceptions, demonstrates technical skills essential to performing duties of the position, including knowledge of pertinent laws, standards, regulations, rules, policies, procedures, and technologies.	☒	☐
Planning and Organizing Work - With few exceptions, recognizes and solves problems, meets objectives, and considers priorities when planning work assignments. Efficiently uses time and resources to produce a quality product with appropriate guidance and completes assignments within agreed upon time frames.	☒	☐
Execution of Duties - With few exceptions, thoroughly and carefully analyzes and researches assignments. Effectively applies necessary knowledge and technical skills in order to perform duties of the position in an acceptable manner. Final work products meet established need, reflect appropriate attention to detail, and are well organized.	☒	☐
Communications - Oral and written communications further agency objectives and, with few exceptions, are clear, concise, well organized, accurate, grammatically correct, and appropriate for the intended audience. Required personal interactions with internal and external constituencies/ counterparts are generally responsive to the needs of these individuals or entities. Keeps these entities and management apprised of relevant issues, changes, and problems as directed.	☒	☐

SEC 2494 (5/03)

Merit Pay

Supervisory Transmittal Form

Employee Name: Gary Aguirre

Supervisor Name: Robert Hanson

Supervisor Recommendation: This employee has:

_____ made contributions of the highest quality

__✓__ made contributions of high quality

_____ made contributions of quality

_____ made no significant contribution beyond an acceptable level of performance

Supervisor's Signature _____ Date 6/27/05

This recommendation is provided as guidance to the Compensation Committee and does not correlate to a level of merit pay increase.

Compensation Committee Recommendation:

_____Merit Increase(s)

Gary Aguirre

I supervised Gary Aguirre from January 18 2005 through the end of the rating period. As shown on his contribution statement, Gary worked extremely hard on one investigation during his time in the group, a significant matter involving the trading by Pequot Capital, one of the nation's largest hedge funds.

Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has consistently gone the extra mile, and then some.

Gary can work on presenting information in a clearer and more concise manner to enhance the effectiveness of his communications both to those he reports to and those he works with.

Written by Robert Hanson

From: Aguirre, Gary J.
Sent: Wednesday, September 22, 2004 9:35 AM
To: Cain, Charles
Subject: PQ approach

Charles:

I have been discussing bits and pieces with you how I see this investigation proceeding and on what legal theories it ought to be based. I have attached an outline that sums up the possible directions of the investigation based on what has been developed so far.

This is not intended to be an outline of the investigation; that would likely come next. I just want to make sure were both on the same track. I also want to invite your suggestions what might be changed, added or deleted.

I am awaiting data from several sources that may also affect the scope of the investigation. These are:

1) More recent and through UAFs from which Stephen Glascoe is obtaining;
2) Books and records documents on Pequot from OC in Boston, including CDs of all PQ trades for a recent 18 month period;
3) More recent SEC referrals data from the NASD.

Should we schedule 15 minutes? Catch you when I can?

Gary

From: Aguirre, Gary J.
Sent: Wednesday, October 06, 2004 12:12 PM
To: Cain, Charles
Subject: Pequot action memo attached.
Charles:

More delay because I had to get back on Blumberg to get some numbers.

Anyway, I'm attaching a draft of an action memorandum. I have modified the Airborne approach slightly to accommodate the 204A claim. We obviously do not have as much data on Emcor as we have on Elite, where the NASD conducted an investigation that lasted several months.

It could have been done a lot of different ways. I look forward to your comments and suggestions.

Gary

Action Memorandum Seeking
Formal Order In Insider Trading Investigation

February 8, 2007

To:	The Commission
From:	Division of Enforcement
Re:	Trading by Pequot Capital Management and its affiliated hedge funds
Action Requested By:	Summary Calendar
Prior Commission Action:	None
Sunshine Act Status	Closed pursuant to 17 C.F.R. Sections 200.402(a)(5), (7) and (10)
Novel, Important Or Complex Issues:	None
Other Offices Or Divisions Consulted:	Office of the General Counsel Richard A. Levine [redacted] (copy provided) Office of Compliance, Inspections, and Examinations Stevenson, Karen A. [redacted] Office of Economic Analysis Dale, William C. Simonyi, Peter G. [redacted] Boston District Office Behara, Shannon J. [redacted]
Source of Case:	Referrals from the New York Stock Exchange ("NYSE"), April 23, 2003, and the National Association of Securities Dealers ("NASD"), March 24, 2003
Persons to Contact:	Paul R. Berger Richard W. Grime [redacted]

Charles E. Cain
Gary J Aguirre [redacted]

Recommendation: That the Commission issue a formal order of private investigation to determine whether there have been violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Section 204A of the Investment Advisers Act of 1940 ("Investment Advisers Act").

I. Summary

This matter involves (1) possible illegal insider trading by Pequot Capital Management ("Pequot Management"), a registered investment adviser, and three of its affiliated hedge funds, Pequot Navigator Offshore Fund, L.P. ("Offshore"), Pequot Navigator Onshore Fund, L.P. ("Onshore"), and Pequot Scout Funds, L. P. ("Scout") and (2) possible violations by Pequot Management, as an investment adviser, of Section 204A of the Investors Advisers Act for failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information.

Pequot Management advises and manages twenty-six hedge funds (collectively "Pequot Funds"), including Offshore, Onshore, and Scout. Pequot Funds claim exemption from registration under Rule 506 of Regulation D of the Securities Act of 1933. Currently, Pequot Management and Pequot Funds comprise one of the largest hedge fund families in the nation, with approximately $4.7 billion under management.

Over the past two years, SROs have referred or "highlighted" at least six matters involving possible insider trading by the Pequot Management and one or more of Pequot Funds to the Division of Enforcement. Among these six were referrals by the NYSE and the NASD of possible insider trading by Capital Management Offshore, Onshore, and Scout in the common stocks of Elite Information Group and Emcor Group.

II. Pequot's Trading in Elite Information Group (Elite)

Brief description of issuer and trading range:

On April 3, 2003, The Thomson Corporation (Thomson), listed on the NYSE under the symbol TOC, made a friendly tender offer for the common stock of Elite at a price of $14.00 per share and, pursuant thereto, acquired 98% of Elite's outstanding shares. Before its acquisition, Elite provided business management software for law firms and professional services companies. Its common stock was registered under Section 12(g) of the Exchange Act and traded on the NASDAQ National Market System, with 7,890,600 shares outstanding. Between October 1, 2002, and April 2, 2003, the ELTE's daily volume traded between a low of 100 shares and a high of 228,000, with an average daily volume of 17,036 shares. During that same period, the share price ranged from $5.89 to $10.16 per share, with a 52 week low of $5.89.

From: Aguirre, Gary J.
Sent: Friday, October 08, 2004 9:17 AM
To: Grime, Richard; Cain, Charles
Subject: Why is Enforcement now bringing Pequot?

Richard and Charles:

With training over, I will soon redraft and resubmit the Pequot action memo. I assume our primary concern is the memo's accuracy since it will be circulated among the Commissioners. In this regard, the proposed revisions would now offer this case history: The NASD referred the Elite Information matter to Enforcement in August 2003 and then, "Subsequent investigation by the staff identified at least six transactions involving possible insider trading by the Pequot Management and one or more Pequot Funds."

This statement is unsupportable. Neither I nor anyone on the staff has discovered an insider trading transaction involving Pequot. Yes, I have prepared a spreadsheet of suspected Pequot insider trading activity since 1999. However, in each one of those 11 cases, an *SRO identified* the transaction and referred it to Enforcement (Market Surveillance), where it stopped. Under these circumstances, the quoted revision is not merely unsupportable; it could be the source of embarrassment or worse for each of us.

By the way, I am not saying that Joe Cella made a mistake. Indeed, for the reasons discussed next, I think his decisions made sense. But first, a little background.

At yesterday's training session, Laura Joseph introduced Hilton Foster as the most knowledgeable person on insider trading at Commission. He lived up to his billing. I discussed the Pequot case with him yesterday afternoon. Cutting to the chase: he considers Arthur Samburg and Pequot to be "serial inside traders." He tried to make a case against them a decade ago, but failed. He says our case will be extremely difficult, but it must be brought. He has agreed to work with me on the case, subject to your approval.

So, I suggest we say something like this: Enforcement and the SROs have been aware of suspicious insider trading activity by Pequot for sometime. The Commission *unsuccessfully* pursued a case against Pequot in the mid-90s. Until now, the referrals have been suspicious, but we were not been able to develop a probable info flow. Elite and an August referral, Blue Coat Systems, give us that linkage. Further, over the past two years, the Pequot referrals from SROs have registered a marked increase. Hence, we've decided to pursue what promises to be a tough case.

Incidentally, during Enforcement training over the past few days, Commissioner Campos and other speakers have encouraged the new staff to bring "the tough case" and candidly inform the Commission when that is being done.

Shall we discuss?

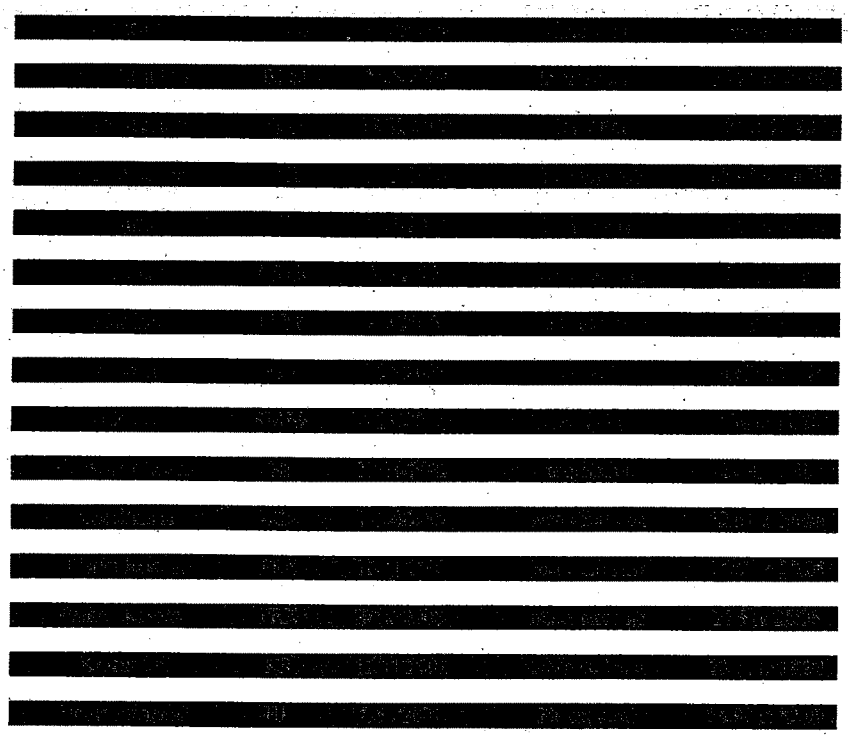
Gary

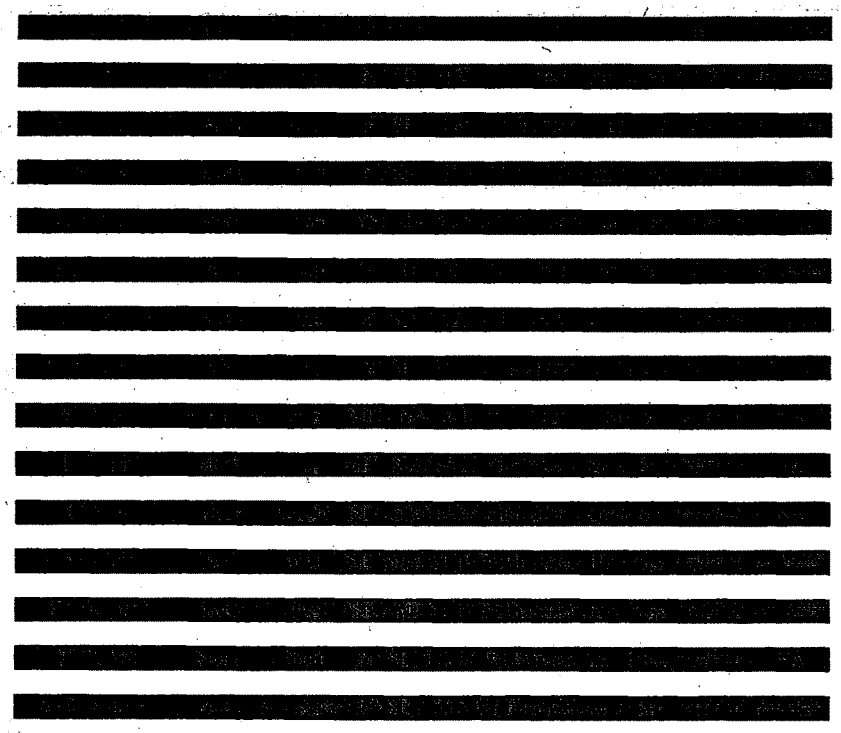
From: Aguirre, Gary J.
Sent: Wednesday, October 13, 2004 1:46 PM
To: Cain, Charles
Subject: Recent PQ referrals

Charles:

Attached is an updated spreadsheet of SRO referrals. By necessity (less data), I will prepare a less comprehensive spreadsheet of pre-2001 referrals.

Gary





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From: Aguirre, Gary J.
Sent: Thursday, October 14, 2004 11:15 AM
To: Grime, Richard; Cain, Charles
Subject: First cut at Pequot Investigation Outline

Richard and Charles:

The attached is a work in progress and is only intended as a general overview. I have not as yet asked Hilton Foster for his input. When approved, as is or as modified, I will schedule a meeting with Hilton, to include Charles if he wishes. I will then begin to work on the subpoenas, chrono requests, and name recognition letters, which I would expect to all go out at about the same time.

Incidentally, Kevin suggested that I remind you that Steve Cutler has asked for input on hedge funds matters at the senior staff meeting next week.

Gary

From: Aguirre, Gary J.
Sent: Wednesday, November 03, 2004 10:59 AM
To: Grime, Richard; Cain, Charles; Foster, Hilton
Subject: Pequot short term invsetgation

Following up on our meeting today, I have outlined the investigative steps that I will take on the short term pending Hilton's preparation of a more comprehensive plan. If I've missed any nuggets, please let me know. Also, what do each of you think about points D ?

A) In general.
    1) Finalize action memo
    2) Blue sheet all market on each referred matter
    3) Double check with SROs to get complete files on referrals (Hilton: I want to discuss with you what more the SRO's customarily have in addition to the referral).
    4) Options
        a) Check with each SRO for options trading
        b) Check with each options exchange on same (is this feasible?)

B) Pequot
    1) Request list of employees and investors
    2) Preserve records
        a) Relevant data on each trade, including Technical, fundamental and all other research.
        b) Include telephone invoices, cancelled checks and statements

C) Issuers
    1) Chronology requests
    2) Name recognition letter
    3) Preserve records relating to transaction

D) Contact foreign exchanges: Should we inquire through the Office of International Affairs whether any major foreign exchange has identified suspicious PQ trades?

E) Peter Simonyi is working on his analysis of PQ trading blotter for other suspicious trades. If this is done soon, I will review, check news and circulate new candidates for possible inclusion in Section C above.

Peter: Shall I bring you up another referral that came in yesterday? Maybe we can discuss point A-3. Got a few minutes?

From: Aguirre, Gary J.
Sent: Monday, December 06, 2004 8:59 AM
To: Foster, Hilton
Subject: PQ things today Dec 6

Got a boatload of things going on today we need to discuss or you should know about. Are you in?

1) Hilton

   a) Called backs: cut scope Four this am;
   b) Samburg split and former PQ employees
   c) Broadview SF "hassle" "Never heard of this before"
   d) Eric's email re IT: Tuesday conference See below
   e) Hedge fund program
   f) Hedge fund expert
   g) HSBC: US or London; talk to International Affairs
   h) Paper files
   i) The OCIE Training Branch has arranged to have the following presentation videoconferenced from OCIE to all other SEC offices on Monday, December 13, 2004 from 1:00 - 3:30pm (EST) as follows: Title: Hedge Funds Speakers: Michael Butowsky and Michele Gibbons, Mayer Brown Any Course Materials Will Be E-mailed To All Offices Prior to the Program At the request of the speakers, this class will NOT be videotaped to provide a more open forum for questions and answers.

2) PQ AM Calls
   a) 9: 30 Strauss
   b) Cigna: Paulin[redacted]Born 1951; Admitted 1979; United States International University, B.A.; Dickinson School of Law of the Pennsylvania State University, J.D.
   c) Bill[redacted]Michelle[redacted]ow are documents coming along? Other actor's testimony?

3) Boston Scientific: Stuart [redacted]
4) Eric: Tuesday is fine.

   a) Greg Cobert and Scott Birdwell, in David Wiederkehr's group,
   b) All data in Sequel which is an enterprise database which will give us more flexibility than smaller databases such as MS-ACCESS
   c) They will want to know the data we'll be submitting to them and how we plan on using/analyzing the data
   d) Formulate the request for electronic records that we'll be getting from Pequot, phone companies, etc.
   e) Once the data is downloaded we can then submit requests to them to have code written in order to extract information and generate reports.
   f) Greg and Scott have assisted in a number of large investigations.

5) 9: 30 Strauss

From: Foster, Hilton
Sent: Wednesday, December 08, 2004 9:47 AM
T : Aguirre, Gary J.
Subject: RE: Nudging Pequot to produce electronic data

I suggest adding Scott's name to the body of the letter and identifying him as our IT guy

---

From: Aguirre, Gary J.
Sent: Wednesday, December 08, 2004 9:33 AM
To: Foster, Hilton; Plimpton, Scott
Cc: Cain, Charles
Subject: Nudging Pequot to produce electronic data

Foster and Scott

I have pasted below a proposed draft of a letter to go by fax to Audrey Strauss of Fried-Frank, counsel for Pequot. I would like to nudge them in the direction of turning over electronic data most usable in form. Per our discussion yesterday, the best way to do this is to find out how they do things, which would be the objective of the meeting. Any suggestions how the letter should be tweaked? Again, consistent with the discussion yesterday, we want to get the data Hilton needs, e.g., phone records that are searchable, as well as all research that went into Pequot's decisions do the trades that are the subject of the investigation.

Draft of letter

Dear Ms. Strauss:

I am following up on my discussions with you and Mr. Harnisch about obtaining the information we have requested, to the extent available, in an electronic format. Equally important is obtaining complete and readily usable electronically stored information, while taking into consideration, as you have suggested, the preservation or retrieval costs. Also, I have understood that your client intends to fully cooperate with staff so that obtaining this information will not unduly delay the investigation.

Mindful of these factors, I am suggesting a conference call or, even better, a meeting in the very near future among Commission staff, you and Mr. Harnisch as well as your client's knowledgeable representatives to address how your client may most effectively and efficiently proceed in providing Commission staff with the requested information. From the staff's perspective, the focus would be on getting a clearer picture of what requested information is now available electronically.

Would you kindly inform me whether your client would be agreeable to such a pone conference or meeting and, if so, when it could proceed?

Sincerely

Gary J. Aguirre

From: Aguirre, Gary J.
Sent: Thursday, December 09, 2004 9:33 AM
To: Foster, Hilton
Subject: Pequot shoping list

Hilton

Got ten minutes? This will be faster than it looks.

1) Strauss: letter and not documents if voluminous

2) Kornblau:
a) My discussion with Charles
b) Email to Richard from Hilton

3) Paper files: Iconnect? Why we need paper? Why we need paralegal?

4) Expert on hedge funds: IM contact?

5) Lori Richards email

6) Cameron:
a) CFO: charts
b) Conflicting input from Cameron
c) Latest list for PQ? Her message to me?
d) All emails before testimony? Reason for another exam?

7) New request letters
a) Par: use Broadview request for phone slips and messages
b) Rambus letter: use Broadview request for phone slips and messages

8) Boston Scientific: use time from July 13 through 19 plus investor people.

9) PQ Respond to letter re FIA

10) International Affairs:

-----Original Message----
From: Richards, Lori A.

Sent: Thursday, December 09, 2004 7:44 AM
To: Aguirre, Gary J.
Cc: Snively, Brian H.
Subject: Re: In the Matter of Trading in Certain Securities, HO-9818

Brian Snively in OCIE could be a contact, and was on our hedge fund review team.
Lori Richards
US SEC

-----Original Message-----
From: Aguirre, Gary J. <[redacted]>
To: [redacted]
Sent: Wed Dec 08 16:41:09 2004
Subject: In the Matter of Trading in Certain Securities, HO-9818

Lori A Richards

Director

Office of Compliance,

Inspections and Examinations

As you may recall from our phone call last month and the draft of the memo for a formal order which was forwarded to you, Enforcement is investigating trading by a large hedge fund family, Pequot Capital Management, Inc., a registered investment adviser under the Investment Advisers Act of 1940. Pequot traded in advance of a number of major news announcements. Each has been the subject of an SRO referral.

We have assembled a team to conduct this investigation, which presently includes Hilton Foster, Marina Ulmishek and me from Enforcement, Eric Ribelin and Stephen Glascoe from the Office of Market Surveillance, and Scott Plimpton, Greg Colbert, and David Wiedkehr from IT.

We are contacting to you to inquire whether you might wish to have someone from OC, hopefully with expertise in hedge fund operations, available as a resource.

Sincerely,

Gary Aguirre

Enforcement Division

[redacted]

From: Aguirre, Gary J.
Sent: Friday, December 10, 2004 9:16 AM
To: Foster, Hilton
Subject: Got a minute to discuss a shorter list?

Hilton

1) Francois testimony

2) Kornblau: Email to Richard from Hilton

3) Paper files: Iconnect?

4) Boston Scientific: use time from July 13 through 19 plus investor people.
    a) Not limited to US
    b) SEC asked to keep confidential
    c) 13-15; market was closed all day on the 16th

5) International Affairs:

From: Aguirre, Gary J.
Sent: Monday, January 10, 2005 1:51 PM
To: Cain, Charles
Subject: Case updates

Charles:

In the Matter of Trading in Certain Securities, HO-9818

On January 6, the Commission issued a formal order authorizing the investigation of possible violations in the trading of fourteen issuers of Section 10(b), 13(f) and 14(e) of the Exchange Act and 204A of the Investment Advisers Act.

All issuers, with two exceptions, have provided provide chronologies in this matter or earlier. These two were delayed since they would increase the risk of public dissemination of the matters, which involved court personnel, before we had spoken with the courts.

Bluesheet data has been accumulated from the brokers who had any significant trading in each issuer during the trading period before each of the 15 announcements. We are delaying the preparation of a single searchable document of all 15 referrals until approximately January 21. We then conduct the following analyses:

1) Sort for individual or institutional traders in multiple issuers whose trading is under investigation;

2) Run various lists against the master list, e.g. did any of Pequot investors trade in any of the issuers before the announcements in issue (I believe this may be something new).

I am currently working through the documents and other information that Pequot, Broadview, and the issuers have provided. After I have worked through the documents, I will be preparing and serving subpoenas as the documents, trading and other information suggest.

The trading information for all Pequot's trading over the past three years came in today. We will be working with Market Surveillance staff, possibly IT staff, Hilton Foster and OEA to mine the electronic data for other suspiciously timed trading by the Pequot affiliated hedge funds.

I have submitted by separate email the recent examination of Mark Francois, investor relations officer of DJO, and how that examinations and relevant documents has suggested the course of the DJO investigation. I expect that this process will be repated with the other issuers.

[redacted]

[redacted]

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

From: Aguirre, Gary J.
Sent: Monday, January 10, 2005 12:17 PM
To: Grime, Richard; Cain, Charles
Subject: DJO Francois Testimony and Direction

Richard and Charles:

I present below the hypothesis of insider trading by Pequot in [redacted]

Pequot History in [redacted]

[redacted] went public in November 2001. Goldman Sachs, whose profit sharing plan is managed by Pequot, acted as Qualified Independent Underwriter. Pequot did not participate in the IPO, but bought later after the price fell. It got out of [redacted] by mid-2002, just before the bottom fell out ([redacted] fell from 8 to under 3).

Pequot began buying into [redacted] in the second half of 2002, holding 870,000 shares by 12/2002, roughly 20% of [redacted] outstanding stock, aside from that held by J.P Morgan. Pequot bought in at approximately $3 per share, [redacted] low, and sold about a year later, from July 2003 through January 2004 at between $12 and $28 per share. The profit on these transactions was approximately $13 million.

Suspected Insider Trading

Over 90% of Pequot's trading took place after two meetings which Pequot's [redacted] analyst, [redacted], had with [redacted] Investor Relations Officer, [redacted], in August (date unknown) and September 25, 2003 (likely but not certain). Of the two, most of the selling took place after the September 25.

I suspect [redacted] told [redacted] in August or September 2003 that [redacted] was going ahead with a $93 million acquisition that was not announced until mid October of 2003 and that the acquisition could require a secondary offering of stock. As you know, [redacted] announced a shelf registration on December 22, 2003, involving $85 million in new stock and plus the sale of four million shares of insiders' holdings (approximately $100 million). Ultimately, this offering caused a 17% dilution of [redacted] stock and about the same fall in its stock price.

[redacted] admitted during his exam that he was aware of the acquisition in September 2003 and that he was also aware that it might require a stock offering. He also read in a portion of his notes that indicate he was discussing the acquisition with another institutional investor at a "one on one" meeting in late September. This was about the time of the suspected meeting with Pequot's [redacted]

[redacted] 12/30 Examination

There were three objectives to [redacted] testimony.

One was to demonstrate that [redacted] had communicated confidential, material information to [redacted], Pequot's [redacted] analyst, before the public announcement on December 22. NYSE records indicate that he told the NYSE [redacted] that he did, while [redacted] now disputes this fact. However, his testimony was impeached multiple times on key factual issues. I believe the record suggests he made up the story for management. That same story was provided to the NYSE and later, with more detail, was provided to us. The bottom line: In less than one minute, Pequot's [redacted] was able to get [redacted] to tell him that [redacted] was going to issue a news release about its [redacted]

The second objective for the [redacted] testimony was more strategic: Did [redacted] and [redacted] officers meet with Pequot at key times before public announcements and before timely trading by Pequot. The theory is this: If [redacted] could get confidential, material information out of [redacted] in less than a minute by phone on December 22, he could very likely do the same in face to face meetings between the two. Further, Pequot

had more bargaining power in September 2003 when it held three times the amount of [redacted] stock than it did on December 22, when [redacted] likely told [redacted] about the announcement of the secondary offering.

The Pequot-[redacted] "one on one" meeting at the UBS conference.

Most of the selling took place after a meeting that likely took place on September 25, 2004, between [redacted] and other [redacted] execs and Pequot's [redacted] at a UBS conference. [redacted] says he can't remember anything said at the meeting or even if it took place. Significantly, [redacted] keeps a detailed a diary of his phone conversations and meetings with institutional investors, including the UBD conference, but his notes of known contacts with Pequot are either cryptic or nonexistent. For example, on December 22, he has notes of almost everyone he spoke with but no mention of his two phone calls with Pequot's [redacted]. Likewise, he had no notes of his conversations with [redacted] on September 25. However, one week before his notes state, "[redacted] [referring to [redacted]]-setting up a (sic) NYC meetings."

There were three types of meetings that took place at the UBS conference. First, there were the issuers' presentations to the assembled analysts. Second, there were "breakaway" meetings at which more detailed questions were asked. Finally, there were "one on one" meetings between individual analysts and issuers. This was suppose to be the arrangement for the Pequot ([redacted]) meeting with [redacted].

Although there was a reference to a September meeting between [redacted] meeting at the UBS and [redacted] in the [redacted] Chronology, I was unaware of the details above before taking his testimony. Given the demonstrated fact that [redacted] is inclined to communicate confidential, material information rather quickly, I will now focus on the August and September 2003 [redacted] contacts with Pequot. We will be obtaining the diaries, calendars and similar documents from [redacted] relating to other officers meetings with Pequot.

How close are we?

I believe we have a provable [redacted] violation of Reg. FD on 12/22/03. I understand that the 14 minute period is by itself too short to bring a proceeding. However, there evidence suggests that was a leak that same morning and heavy trading. Further, [redacted] and [redacted], to a lesser extent, tried to mislead us. Is this still too little without proof that that someone traded on the information?

Gary

From: Aguirre, Gary J.
Sent: Monday, January 24, 2005 11:19 AM
To: Kreitman, Mark J.
Subject: Transition

Mark:

Should I check in with Robert Hanson?

I took a look at the Catalina Marketing matter as it relates to Pequot. It finished covering a short the day before the announcement of stock-buyback and first time dividend. Interesting but not too exciting. I have seen something similar in the Pequot pattern involving another SRO referral, i.e., Pequot got very aggressive with an issuer as the market moved against Pequot's interests. I would suggest that the Catalina matter involving Pequot be split off and thrown in with the rest of the pack (see attached). We are doing the same in regard to another referral with Reed Muoio.

About Pequot, it is actually 14 insider trading cases. I am working on the matter with Hilton Foster, Market Surveillance team headed by Eric Ribelin, Brian Snively of OC, Andy Caffrey of OEA, and Scott Plimpton and others from IT. I think I can give you a handle on the matter in a half hour. Attached is a spreadsheet of the different insider trading matters; all were SRO referrals. It's a bit dated but should give you a sense of the scope.

[redacted] AUSA for SDNY, is anxious to work with us on one SRO referral that involves a possible bribe to a law clerk of a district court judge. We plan on meeting with [redacted] next week and sharing information, as a preliminary step to meeting with the trial judge [redacted] wants to handle the trial judge contact, but Hilton felt that should be done by AD or above and staff from the investigative section handling the matter, as it was done before in a similar matter. I think [redacted] also felt tha[redacted] should not handle the matter alone. Paul is very sensitive about how this will be handled.

[redacted]

Gary

From: Aguirre, Gary J.
Sent: Tuesday, January 25, 2005 3:59 PM
To: Hanson, Robert
Subject: FW: Subpoena attachment

Robert:

In looking over the attachment for the subpoena, I noticed that it called for the emails in PST format, rather than TIFF. This issue recently arose in connection with our request for emails to Blue Coat, an issuer in Pequot. Scott Plimpton, IT's email specialist, advises that TIFF is preferred (see his email below).

In any case, I dropped off the subpoena attachment with Scott for his feedback.

Gary

-----Original Message-----
From: Plimpton, Scott
Sent: Monday, January 10, 2005 8:20 AM
To: Aguirre, Gary J.; Peterson, Timothy P.
Subject: RE: Blue Coat Emails

The preferred format is for a Concordance loadable production. This can include TIFFs. They should also include the load and cross-reference files needed for Concordance and also the OCR text to facilitate searching. We can also process PSTs and load them into Concordance but this takes more time and effort on our part and the attachments are not searchable. Often, people prefer to produce TIFFs (and the other Concordance files) because TIFFs are not easily modified and the image can be Bates stamped.

If you have any questions, let me know.

Thanks,

Scott

-----Original Message-----

From: Aguirre, Gary J.
Sent: Friday, January 07, 2005 3:20 PM
To: Peterson, Timothy P.; Plimpton, Scott
Subject: RE: Blue Coat Emails

Scott:

Assuming Tim's assumptions are correct, is it more economical to put the data in .pst files? Much more?

Thanks,

Gary

-----Original Message----
From: Peterson, Timothy P.
Sent: Friday, January 07, 2005 2:55 PM
To: Aguirre, Gary J.; Plimpton, Scott
Subject: Blue Coat Emails

I just spoke with Jack Seagal of Wilson Sonsini, and he said that they will be ready to deliver a large portion of the non-archived emails on Monday.

If either of you are around this afternoon, please give me a call. Seagal told me that the emails are coming over as .tiffs, as requested by us. I want to make sure that's right, as, if I've got this right, .tiffs are static images that can't be searched, whereas they could just send us an Outlook .pst file that would be much more useful. Is this right? Or is there something about it I'm not getting right?

Tim

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F St. N.E.
WASHINGTON, D.C. 20549-0800

WRITER'S DIRECT DIAL LINE
[redacted]

May 25, 2005

Via Facsimile to [redacted] and via Federal Express

Karl P. Kilb
Bloomberg L.P.
731 Lexington Ave.
New York, NY 10022

Re: In the Matter of Trading in Certain Securities; MHO-9818

Dear Mr. Kilb:

You may disregard the subpoena served on your custodian of records under cover of our letter of May 23. We will reissue the subpoena if we decide it is necessary to obtain the e-mails in question.

If you have any questions, please do not hesitate to call me at [redacted] Thank you for your cooperation.

Sincerely,

Gary J. Aguirre
Senior Counsel

Enclosures

From: Kreitman, Mark J.
Sent: Thursday, February 03, 2005 12:44 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert
Subject: RE: Pequot investigation plan

Gary – All this looks good. Still not certain if we're encountering resistance to clear identification of the persons who directed the trades in question. If so, I'll call Audrey today, as suggested. Thanks. Mark

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From: Aguirre, Gary J.
Sent: Thursday, February 03, 2005 10:00 AM
To: Kreitman, Mark J.
Subject: RE: Pequot investigation plan

Mark and Robert:

It's not that Audrey has refused to provide any information. Rather, the information has been delayed and when it comes, it's been in double speak. It was delayed from December 17 to January 7 (then nothing came but we got double speak), then was delayed till January 14 (then in complete and contradictor), then meeting on January 18 (with more to come), then new list (February 1), couched in terms that undermine our ability to rely on it plus it is inconsistent with other information.

Yesterday, I emailed the draft investigation plan, which was not circulated, from approximately January 1, 2005. I have also attached that draft to this email, with further comments and color coating. The items shaded in green were done. The items shaded in grey were not done because they were dependent on Pequot's productions, which were inadequate or incomplete. The items highlighted in yellow were not done but had no relation to problems with Pequot.

I have also attached a revised plan which has been emerging from my discussions with you. It shortens the investigation of all 17 matters to five weeks, per my discussions with Mark, and assumes no voluntary compliance by Pequot with our earlier requests.

I have not attempted to lay out in this e-mail why I and others believe Pequot engages in wholesale insider trading or how that case would be proved. This has been the subject of meetings, discussions and e-mails with Richard earlier in the investigation. At your request, I would be happy to prepare a memo summarizing these matters for Monday.

Gary

From: Kreitman, Mark J.
Sent: Wednesday, February 02, 2005 6:11 PM
To: Aguirre, Gary J.; Hanson, Robert
Subject: RE: Pequot investigation plan

If Audrey won't tell us at once who directed each trade, I'll call her tomorrow.

From: Aguirre, Gary J.
Sent: Wednesday, February 02, 2005 5:16 PM
To: Kreitman, Mark J.; Hanson, Robert
Subject: Pequot investigation plan

Robert:

This was the latest plan that had been prepared for Richard just before the formal order was issued. Should I prepare something that fleshes things out more?

Gary

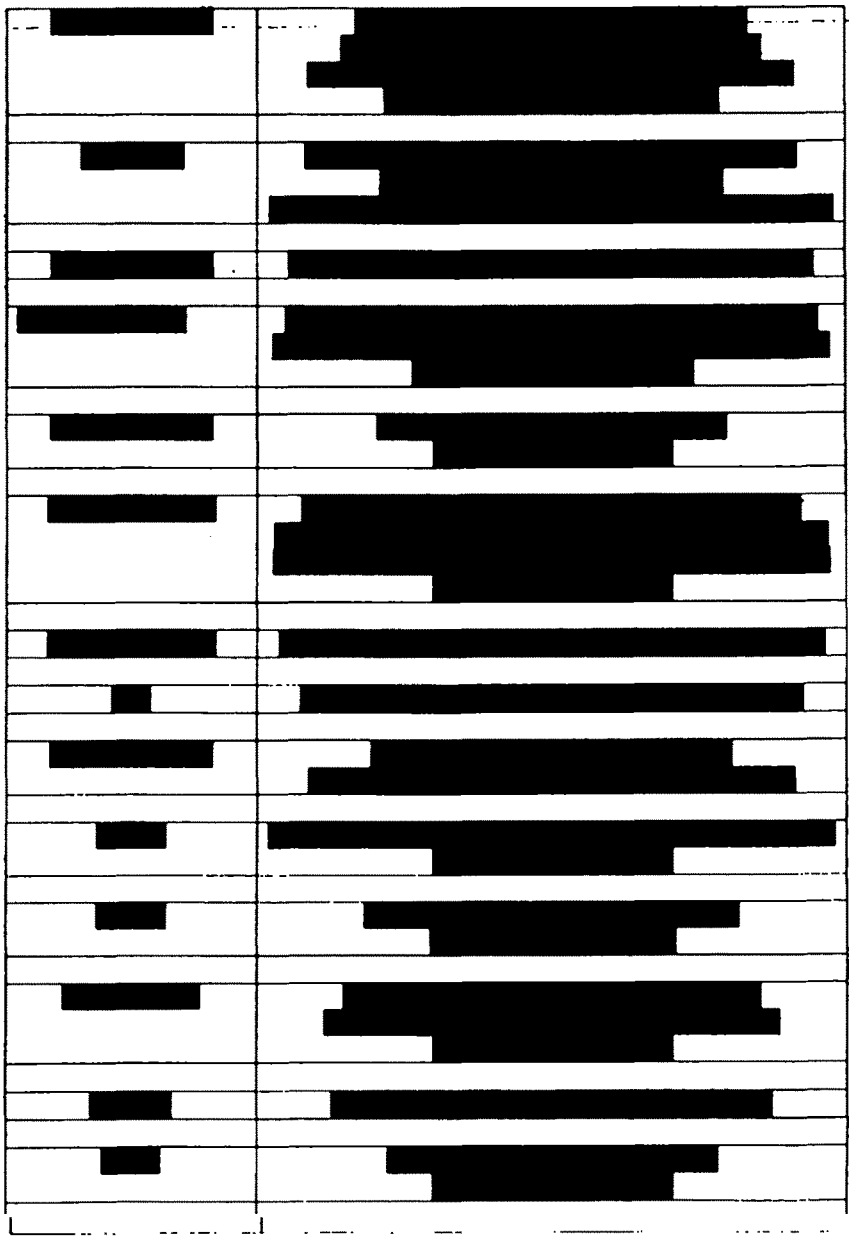
Investigation Plan:-February 3, 2005

Date	Activity
February 4	Pequot final production per November request.
February 4	Issue subpoenas for Pequot decision makers distilled from Pequot list, trade blotters, and issuers' production; finalize how to subpoena and electronic data with IT input
February 7	Review Pequot Production: any additional subpoenas.
February 7 through March 4	Out of office on personal matters.
February 21	Documents from Pequot if any per subpoena (which were not produced per request) and individual's documents.
March 7	Create Hot Docs for possible violators, i.e., PQ, issuers, etc., then docs for imaging.
March 14	Take exam's of Pequot decision makers and compliance officer (shortened exams)
March 21	Retain hedge fund consultant? Dependent on earlier steps.
March 21	Stacy Dwyer Exam; see FBI reports at NYSE US Attorney
March 21	See SDNY District Court re Astra-Par if warranted.
March 21	Continued exam of [redacted] DJO
March 28	Examinations of Broadview and other issuers
March 28	Trim case to strongest matters

Investigation Plan: January 1

[redacted]

Date	Activity
[redacted]	[redacted]



From: Aguirre, Gary J.
Sent: Friday, February 04, 2005 6:00 PM
To: Kreitman, Mark J.
Subject: Pequot: Audrey call

My email is functional again; attached is memo.

Mark:

I woke up in the middle of the night thinking about your call with Audrey. If I correctly understand what Audrey said, it makes no sense. Most of her claims why Pequot has not provided 204-2 info are new: never asserted when the issue was addressed in multiple letters, phone calls, or the January 18 meeting with staff and four Fried-Frank attorneys. Some comments raise concerns whether we can place reliance on the list of decision-makers Harnisch gave us. I have a growing concern they are shielding people, those Pequot does not want us to question. Instead, they may have identified their best advocates. Please keep in mind that Audrey was in the process of refusing to give us their trading in Excel worksheets when she got caught in a whopper. She also played dumb at the January 18 meeting whether Pequot had analysts, saying something to the effect that she's not sure they have people who follow stocks. In sum, I think we must pin her down before the subpoenas go out. But maybe there was some misunderstanding on my part what she said to you. Here's what I understood and my responsive comments.

1) **Is Audrey saying Rule 204-2 does not apply to Pequot because it contemplates a traditional investment adviser client relationship, e.g., Adviser recommending to Client?** If so, this is new: I do not recall it being asserted in writing, over the phone, or at the face to face meeting. I have discussed this issue (the application of Rule 204-2 to Pequot) with OC, IM, the Chief Counsel's Office and all believe it applies. All think Pequot would be in violation of the rule if they did not specify the person, but several have suggested IM be asked to give us its take on the issue. Eric and I initiated a call last week to IM, but have not heard back. I think we should address the question to OC and IM today.

2) **Is Audrey saying that a Rule 204-2 was not recorded because an investment committee made the decision, not an individual?** If so, where are the minutes or notes of those meetings which we requested last November? None have thus far been produced or designated, but there will be another production today. Further, this is just another away of saying Rule 204-2 does not apply to us (see last point).

3) **Is Audrey saying we do keep this information, but we just don't think it will be very valuable to you?** It may not be, but shouldn't we make the call whether it's helpful or not?

4). **Is Audrey saying we already gave you the information?** If so, why are they so shy about putting that statement in writing? For example, they could say, "Rule 204-2 information is contained in such and such..."

5) **Is Audrey *now* saying that the portfolio managers participated in the decision and that info is in the trade blotters?** But this makes no sense either. For example, the trade blotter says Mark Broach was the manager on the Coinstar trades, but Pequot has not listed him as one of the persons that participated in the decision to buy Coinstar. This comparison is also true of four other issuers. If the trade blotter is the "best place" to find the 204-2 person, as Audrey told six staff members at January 18 meeting, why is the 204-2 person not even listed on Pequot's Exhibit A of people ***involved*** in making the decision? The broader class of Exhibit A, those ***involved*** in the decision, must include the narrower class, those recommending the stock, as a matter of logic.

6) **Is Audrey now saying that we could give you better info had you just broken down the trading period into smaller periods?** If so, this is a really worrisome comment. Are they saying that the people listed on Exhibit A are only those involved for the ***entire*** period on all trades and those that were involved in some incremental period are not included? If so, this is a ridiculous and self-serving interpretation of the request. It's also brand new. It also invites more delay because it implicitly says: rewrite your request and we will start all over again. Here is the question addressed to Pequot, "Please identify each person involved in Pequot's decision to engage in transactions in the above issuers ***during the timeframes*** referred to as the 'Pequot Trading Range.'" This would include any person who participated in the trading decisions on any single day during the trading period. It was never suggested before that the list would be narrowed. Part of the reason they got more time was Kevin Harnisch's pleas that they needed it because they wanted to make sure the list was complete.

One likely group Pequot may be shielding: those that left over the past three years. There has been turnover at Pequot in the past several years e.g., those that resigned from the International Fund last week (see below). Yet, according to Eric, Pequot has listed none of the people that left among the decision makers. Are there some unhappy people--also decision makers-- among them that Pequot does not want to identify? Harnisch's description of their process of finding the people who participated is consistent with this theory: we have asked people if they were involved. Obviously, people who are not there could not be asked. If it later turns up that someone else made the decision, they're covered: we told you we only surveyed people who are there. Why have they not looked at their documents, still mostly not produced, to give us this information?

SECTION: COMPANY NEWS

HEADLINE: Pequot Intl. Fund - Re: Directorate

BODY:
Pequot International Fund, Inc
26 January 2005
COMPANY ANNOUNCEMENT
For Immediate Release
26 January 2005
PEQUOT INTERNATIONAL FUND, INC.
Re: resignation and appointment of directors
The Board of Directors (the "Directors") of Pequot International Fund, Inc. (the "Fund") wishes to announce the following resignations and appointments of Directors:
With effect from 30 September 2003, Mr. Walter Schendel resigned as a Director of the Fund to pursue other business interests.
With effect from 30 September 2004, Mr. Thomas Healy resigned as a Director of the Fund to pursue other business interests.

From: Aguirre, Gary J.
Sent: Tuesday, February 08, 2005 1:52 PM
To: Kreitman, Mark J.; Hanson, Robert
Subject: FW: Pequot/Order Memoranda

Mark and Robert:

Please see comments highlighted in yellow below. Brian is with OCIE and co-authored the Hedge Fund Study issued by the Commission last year.

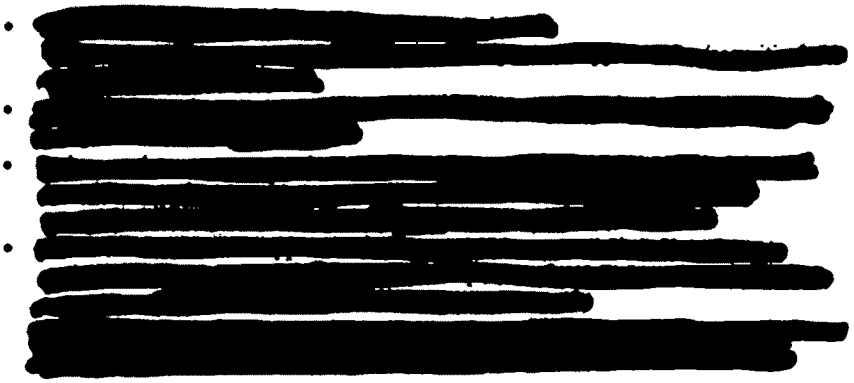
Discrepancy and possible rules violation: Brian refers to the discrepancy between the persons identified by Pequot in this investigation as those "involved in making the decisions" and the information recorded in Pequot's trade blotter, which they claim is the "best place" to find the 204-2(a)(3) person who recommended the decision.

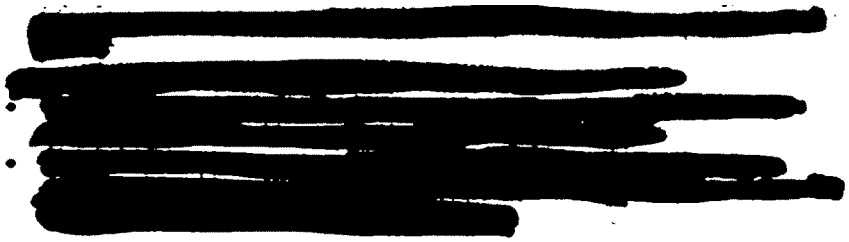
Gary

From: Snively, Brian H.
Sent: Tuesday, February 08, 2005 10:12 AM
To: Aguirre, Gary J.
Cc: Pereira, Lidian B.; Kelly, Mavis A.; Breffitt, Kathryn S.
Subject: Pequot/Order Memoranda

Gary,

Just wanted to follow-up briefly on our meeting from a week or two ago. First, I indicated that I would try to find some documents here that we might have pertaining to questions that one might ask about a firm's portfolio management/investment decision-making process. As such, I have found some questions/materials that appear in certain non-public work modules we maintain. The attached document outlines some of these questions (and exam techniques). I believe you are looking to obtain a basic understanding of Pequot's investment decision-making process. I think having Pequot take you through this process and answering basic questions such as the following might be helpful:





These are the types of things you may want to ask. The attached document may give you some more ideas. If you want to sit down and discuss/brainstorm, I'd be glad to help.

Also, regarding our conversation of who normally appears on the order memoranda [Rule 204-2(a)(3)]. I just want to reiterate that from our experience, there is normally one person ultimately responsible for the client account or fund. This person/portfolio manager is the person we normally see on the order memoranda. Asking Pequot fully about their investment decision making/portfolio management process will allow you to better understand who is ultimately responsible for making the purchase/sale recommendations for a client's account (i.e. whether or not it is always a PM). However, it should be noted that there are probably several persons involved in the process of actually recommending securities (e.g. research analysts, investment committees). Any of these people could have received inside information. However, if there is a person who has ultimate responsibility for the client account, it is highly possible that he/she may have received this information at some point (unless there were other more compelling reasons to make unusual changes to certain holdings).

Further, regarding the order memoranda, there could be situations where a client account or fund is team managed. In these scenarios, I am not sure that we would necessarily have a problem with the firm putting 'team' or simply an individual person involved in the process on the order memoranda. I think we are generally more concerned with understanding the entire process and any documentation the firm might have in making investment decisions. However, if the firm were to put 'team' on the order memoranda, we would probably expect it to keep records of team members (and their dates of involvement with the team). Likewise, if a registrant were to put a research analyst who recommended the trade originally (and not a PM who was ultimately responsible for the account), we may not have a problem with that also depending on the circumstances. Please note that I have not personally seen either of these scenarios in my experience -- I have always seen an individuals name, generally a portfolio manager.

[redacted] deficiencies (in particular, those deficiencies relating to who is listed as the person that recommended the trade) are not normally a high risk area for our exams; we are more interested in a general understanding of the investment decision making process and if the order memoranda deficiency is indicative of other, more severe problems.

Please let me know if you have any questions.

Brian

<< File:[redacted]>

This message is intended only for the designated recipient(s). It may contain confidential, privileged or proprietary information that is official work product of the U.S. Securities and Exchange Commission.

From: Kreitman, Mark J.
Sent: Monday, February 14, 2005 12:13 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert
Subject: RE: Pequot Wednedsay meeting

I have a conflict at 2, Gary, but if Hanson can attend, why not go ahead. Mark

---

From: Aguirre, Gary J.
Sent: Monday, February 14, 2005 11:56 AM
To: Snively, Brian H.; Ulmishek, Marina; Caffrey, Andrew; Glascoe, Stephen; Ribelin, Eric; Foster, Hilton; Williams, Constance; Conroy, Thomas
Cc: Kreitman, Mark J.; Hanson, Robert
Subject: Pequot Wednedsay meeting

Pequot Team:

We are entering a critical stage of this investigation in March, when we take the examinations of the Pequot execs who made the trading decisions that are the subject of this investigation, as well as some of the issuers employees suspected of being tippers. So that we can discuss what needs to be done between now and then, I have reserved Room 8120 for Wednesday at 2:15 pm.

Here are some of the matters we need to discuss:

1) Getting incoming CDs with email and other electronic data on Iconnect or the J-Drive;
2) Searching through the trading data for individuals who may have been trading in parallel with Pequot;
3) Getting the telephone records organized for quick and easy access;
4) One of Eric favorites: could Boston office conduct exam of Pequot to force them to cough e-mails and other records?
5) Andy: Have you been able to tweak your software to adjust to the Pequot trading profile?
6) Reviewing emails: all help appreciated. Tom has been looking at Blue Coat

I will circulate a more complete agenda before the meeting.

Look forward to seeing all of you.

Gary

From: Hanson, Robert
Sent: Wednesday, February 16, 2005 11:27 AM
To: Aguirre, Gary J.
Subject: RE: Pequot Wednesday meeting

thanks

From: Aguirre, Gary J.
Sent: Wednesday, February 16, 2005 11:26 AM
To: Hanson, Robert
Subject: RE: Pequot Wednesday meeting

Yes, I have handled about five or six of them since October.

From: Hanson, Robert
Sent: Wednesday, February 16, 2005 11:25 AM
To: Aguirre, Gary J.
Subject: RE: Pequot Wednesday meeting

Gary,

A pressing matter has come up that I need to attend to at 2:30. Are you comfortable handling the meeting?

From: Aguirre, Gary J.
Sent: Wednesday, February 16, 2005 11:22 AM
To: Hanson, Robert
Subject: Pequot Wednesday meeting

2:15 at 8120

Draft agenda below

Pequot Team:

We are entering a critical stage of this investigation in March, when we take the examinations of the Pequot execs who made the trading decisions that are the subject of this investigation, as well as some of the issuers employees suspected of being tippers. So that we can discuss what needs to be done between now and then, I have reserved Room 8120 for Wednesday at 2:15 pm.

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I will circulate a more complete agenda before the meeting.

Look forward to seeing all of you.

Gary

From: Aguirre, Gary J.
Sent: Wednesday, February 16, 2005 11:49 AM
To: Kreitman, Mark J.; Hanson, Robert; Ribelin, Eric; Foster, Hilton; Ivarone, Jason; Plimpton, Scott; Snively, Brian H.
Subject: Pequot: hedge funds, IAs, books and records, and emails

I am summarize below the key points from two phone calls this morning with Gene Gohlke regarding the application of the Section 204 and the relevant rules to hedge funds, such as Pequot, that are IAs.

A) **Regarding existing documents, what must an investment adviser-hedge fund produce under Section 204?**
   1) The Commission takes the position that an IA must produce ***all*** records (broadly defined under section 3(a)37 of the Exchange Act) in its possession, including emails.

   2) **What about privileged documents?** IA must provide log that shows that legal advice was given.

   3) **How much time for review and production of emails where an IA claims it must have its attorney review every document?** [redacted]

B) **How do certain provisions of Rule 204-2 apply to an IA such as Pequot?**
   1) Rule 204-2 requires a registered IA, including a hedge fund, to maintain "accurate and current books and records relating to its investment advisory business," including

      a) **204-2(a)(3)** requires a "memoranda that shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed such order." [redacted]

      b) **204-2(a)(7)** "Originals of all written communications received and copies of all written communications sent by such investment adviser relating to (i) any recommendation made or proposed to be made and any advice given or proposed to be given." [redacted]

   2) How long must the records described in 204-2(a)(3) and (7) be maintained? Not less than five years from the last use of the document.

From: Aguirre, Gary J.
Sent: Friday, February 18, 2005 11:21 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject:

I have attached exam schedule. In some cases, I have set the exams of Pequot officers and employees to immediately follow the exams of the issuers or Broadview exams to minimize the time for them to get their stories worked out. Pequot exams are color coded in grey. Other colors are for each party.

These are the first set of exams to be scheduled. When these dates are firm, hopefully today, a second set of subpoenas are ready to go that Hilton will send out.

From: Aguirre, Gary J.
Sent: Friday, February 18, 2005 10:03 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: FW: Pequot: hedge funds, IAs, books and records, and emails

Further response from to my inquiry below on OCIE's e-mail policy.

From: Snively, Brian H.
Sent: Friday, February 18, 2005 9:36 AM
To: Aguirre, Gary J.
Cc: Foster, Hilton; Ribelin, Eric; Plimpton, Scott; Gohlke, Gene A.; Breffitt, Kathryn S.; Kelly, Mavis A.
Subject: FW: Pequot: hedge funds, IAs, books and records, and emails

Gary,

Just a follow-up on some of our discussion from two days ago. We discussed a variety issues and I wanted to 'add' some more information to the discussion (although it may have already been covered). Clearly, as we discussed (and as mentioned in the messag below), advisers are required to keep any e-mails that contain information that is cover by the books and records rule of the IA Act.

[redacted]

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

Let me know if you have any further questions. I will be out of the office next week, but will be returning the week of the 28th. Thanks.
Brian

From: Aguirre, Gary J.
Sent: Wednesday, February 16, 2005 11:52 AM
To: Kreitman, Mark J.; Hanson, Robert; Ribelin, Eric; Foster, Hilton; Ivarone, Jason; Plimpton,

Scott; Snively, Brian H.
Subject: Pequot: hedge funds, IAs, books and records, and emails

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2) How long must the records described in 204-2(a)(3) and (7) be maintained? Not less than five years from the last use of the document.

Gary

From: Aguirre, Gary J.
Sent: Tuesday, February 22, 2005 7:33 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Ribelin, Eric; Foster, Hilton; Aguirre, Gary J.
Subject: Pequot proposed strauss letter

Robert:

Here are my thoughts on the next conference call with Fried-Frank:

1) E-mail production. I copied you on the e-mail to David W. re email issues.

2) Concerns about postponing Exams. Some thought went into the sequencing of the exams, e.g., Samberg early, Rossman after Farrell, possible issuer tippers immediately before possible Pequot tippees. I suspect Fried-Frank will try to reverse the sequencing of Pequot employees and try to get enough time after issuers testify so possible Pequot-tippees can know issuer-tippers testimony. Solution: get Fried Frank to tell us their calendar conflicts during the telephone call, make no commitments, and then reschedule. I did this with Broadview.

3) I have attached a proposed e-mail which summarizes our position from last Friday and tries to limit what Fried-Frank will try to do. The letter can be initialed and sent from me, signed and faxed from here or go out under someone else's signature.

4) The letter presses Fried-Frank on the privilege issue. How can the retrieval process of e-mails from backup tapes called for by a Commission subpoena involve any privilege? Attorney-Client or Attorney Work-product: Valid privilege? Does this imply that attorneys are two involved in a mechanical process? What decisions is Fried-Frank making?

5) The letter raises another Fried-Frank tactic which we should not let slide, i.e., its apparent failure to comply with provisions of the subpoena that call for documents other than e-mails. As discussed in the letter, we have agreed no extension for these documents. In this regard, it only asks for documents that were the subject of earlier requests which Pequot presumably provided except for one item specified in the letter. The most important documents Pequot has

not produced, critical to the integrity of the investigation, are the logs specified in the paragraphs A.7 through A.7 which read:

a) If you withhold any responsive documents based on an assertion of privilege, you must include with your transmittal letter a privilege log setting forth the following information for each document withheld (i) the date of the document; (ii) the description of the document, (e.g., "memorandum," "letter," "notes"); (iii) the author(s) of the document; (iv) all recipients of the document; (v) all others who have been informed about the substance of the document even if they have not received it, (vi) the subject matter of the document; and (vii) the nature of the privilege asserted (i.e., attorney-client, attorney work product).

b) The transmittal letter must include a log specifying the bates range of the documents you are providing stated separately for each of the twenty-three categories of documents which are the subject of this subpoena.

c) If you have previously provided documents in this matter responsive to the twenty-three categories specified below, do not provide the same documents again. Instead, you must provide a log with your transmittal letter specifying the bates range of the documents you previously provided, stated separately for each of the twenty-three categories of documents which are the subject of this subpoena.
Gary

From: Kreitman, Mark J.
Sent: Wednesday, February 23, 2005 5:01 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert; Foster, Hilton; Ribelin, Eric
Subject: RE: Fried Frank Style Cooperation

This might merit a short latter on your return, perhaps in conjunction with other production defalcations sure to occur.

-----Original Message-----
From: Aguirre, Gary J.
Sent: Wednesday, February 23, 2005 4:54 PM
To: Kreitman, Mark J.
Cc: Hanson, Robert; Foster, Hilton; Ribelin, Eric
Subject: Fried Frank Style Cooperation

Will do.

From: Kreitman, Mark J.
To: Aguirre, Gary J.; Hanson, Robert; Foster, Hilton; Ribelin, Eric
Cc:

Subject: RE: Fried Frank Style Cooperation
Sent: 2/23/2005 4:32 PM
Importance: Normal
Agreed. We need to continue to document this pattern of behavior with a view to possible §17(b) charge and perhaps some disciplinary action against the law firm.

----Original Message-----
From: Aguirre, Gary J.
Sent: Wednesday, February 23, 2005 3:48 PM
To: Hanson, Robert; Kreitman, Mark J.; Foster, Hilton; Ribelin, Eric
Subject: Fried Frank Style Cooperation

Does this sound like cooperation?

Our November 24, 2004, letter, asking Pequot to identify the decision makers, set the dalivery dat for this info as follows:

"Please forward the requested information as soon as possible, but no later than December 17, 2004, to..."

The KH letter of February 22 states "As a practical matter, we could not determine whether a person satisfied the criteria of your November 24 request until we had an opportunity to interview that person. We have been conducting ongoing interviews of Pequot employees since December 17, 2004."

In short, Fried Frank began the interviews on the date the information was due.

From: Aguirre, Gary J.
Sent: Friday, February 25, 2005 6:25 AM
To: Hanson, Robert; Ribelin, Eric; Foster, Hilton
Cc: Kreitman, Mark J.
Subject: Pequot: violating IA books and records provisions of Section 204 and Rule 204-2?

Here's some thoughts for some next steps:

1) [redacted]
   a) [redacted]
   b) [redacted]
   c) [redacted]

2) Do Tuesday conference call to broaden what we know;

3)If not satisfied after Tuesday call, Subpoena Onsite project manager, Pequot IT person, and Pequot compliance officer for examinations as soon as possible.

Your thoughts?

Gary

From: Aguirre, Gary J.
Sent: Tuesday, March 01, 2005 1:05 AM
To: Hanson, Robert; Ribelin, Eric; Foster, Hilton
Cc: Kreitman, Mark J.
Subject: A revised investigative plan for Pequot

The plan we had going into the telephone conference on February 18 with Pequot has been fully frustrated by its tactics. FF's has now played a trump card—all witnesses need their own counsel--to buy more delay. For strategic reasons, I think we should grumble about this tactic but allow the exam dates to slip. Further, I think we should send out the second set of subpoenas, which are ready to go, for the other Pequot employees who were involved in the trading decisions or had contacts with the issuers. They will obviously grumble about these subpoenas and want time to bring in counsel to represent each individual. I think we should let the exam dates slip as well.

I think our strategy should focus on getting Pequot's e-mails from all sources--both internal and external. The conference call today should be directed at clearing any obstacles to getting the internal e-mails. Those should include the following:

1) The e-mails for the specified periods and individuals in Appendix B to the 2/7 subpoena. This should also include double deleted e-mails or a search through all e-mails for the relevant time periods for copies.

2) It should include all e-mails relating to items 10-14 below. This will likely involve key word searches through all e-mails for the relevant time period.

3) We should also let them know that we are send a second subpoena for the remainder of the e-mails sought by our 11/24 letter. I told KH this was coming so it should be no surprise.

The key to moving ahead with this strategy is to get some straight answers from Onsite today regarding what they were asked to do and how far they have progressed.

Regarding external e-mails, I believe this is Pequot's greatest fear. Broadview poses a great risk for Pequot since Broadview may not deep-six the e-mails which got lost in Pequot's "double deletes" or otherwise. We should of course get these e-mails from the rest of the issuers, some of which we have or are getting. I think we should also serve subpoenas on key broker-dealers, such as Goldman and Morgan Stanley, whose ties to Pequot propitious timing seem to be frequent.

Gary

Appendix B

Name	Period
Navroze Alphonse	11/1/02 through 10/31/03
Joe Batcha	7/1/03 through 6/30/04
Mark Broach	1/1/2001 through 12/31/2003
Jeremy Chase	2/1/03 through 1/31/04
Paul Farrell	5/1/03 through 4/30/03
Josh Fisher	1/1/02 through 10/31/02
Faraz Naqvi	2/1/2002 through 1/31/03
Steve Orlov	9/1/03 through 5/30/04
James Patricelli	2/1/02 through 1/31/03
Arthur Samberg	1/1/01 through 12/31/03
Gregory Rossman	9/1/02 through 5/30/03

11. All minutes, notes or documents, relating to any meeting between any agent, officer or employee of Pequot and any agent, officer or employee of any of the fourteen issuers specified below in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C;

12. All written communications between any agent, officer or employee of Pequot and any agent, officer or employee of any of the fourteen issuers specified below in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C;

13. Any note, report or analysis prepared by any Pequot analyst relating to any of the fourteen issuers specified below in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C;

14. Any note, report, analysis or other document considered by the trader, account manager or any other person who participated or was otherwise involved in the decision to trade in the securities of the fourteen issuers specified in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C;

From: Aguirre, Gary J.
Sent: Wednesday, March 09, 2005 11:27 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: FF's Games

I am not pretending to have your experience or any knowledge how the big firms operate by my comments below. However, I do believe I went to the FF-Straus-Harnisch, et al,
school for almost three months before you guys into this one.

At the present, I do not think we have a strategy to deal with FF in this investigation. Rather, FF is now setting the pace and scheduling of our investigation. I do not believe a tit for tat series of letters to
and from FF is a strategy. This is more like waging a land war with the Chinese.

We should employ a strategy that makes FF realize that it is taking its client down a path that goes over a cliff. [redacted]

FF is now dictating the course of our investigation on the two most important aspects: e-mails and Pequot exams. It is also holding its order entry times hostage to an SEC concession that Pequot has
been a good boy. I discuss below how I think we got here. I believe we need to be firm to get the investigation back on track. If we don't, I suspect it will travel down a similar track as did *BOA Securities*—for years.

Examinations
I have attached below the schedule I set for the Pequot examinations. After the first group of exams were firmed up, I intended to serve the second set of subpoenas listed below. Thought went into the
scheduling of those exams. For example, Pequot officers (Samberg) were set for the first week; now they are last. Farrel--who FF has identified on Elite trading--came before Rossman--who they're worried about (Karl asked why we were taking his exam during the 2/15 call). Now, they have flipped them, making sure Farrel will know where I'm going. Incidentally, my e-mail of February 22 warned:

" Concerns about postponing Exams. Some thought went into the sequencing of the exams, e.g., Samberg early, Rossman after Farrell, possible issuer tippers immediately before possible Pequot tippees. I suspect Fried-Frank will try to reverse the sequencing of Pequot employees and try to get enough time after issuers testify so possible Pequot-

tippees can know issuer-tippers testimony. Solution: get Fried Frank to tell us their calendar conflicts during the telephone call, make no commitments, and then reschedule. I did this with Broadview."

Now, FF has figured out the strategy inherent in my exam schedule and reversed it to FF's and PCM's advantage.

E-mails
By its letter of 2/10, FF first raised the issue whether e-mails were called for by the subpoena beyond those called for by C.6. The next day, by my letter of 2/11, I told them they were. PQ now claims
that there was an agreement at the 2/11 meeting narrowing the scope of folders and effectively our subpoena to eliminate e-mails except for Item C.6. By their letter of 2/14, FF claimed that we had
agreed during the 2/11 meeting that no e-mails, except those covered by C.6, would have to be produced. That's incorrect. We discussed "double deletes" and the possibility of key word searches.
From that, they made the leap that we had narrowed the subpoena, despite my 2/11 to the contrary. I would like to point out that the tactic FF employed was predicted by me three days after the 2/15 phone call.

Here's the relevant language from my letter of 2/17 (which was not sent):

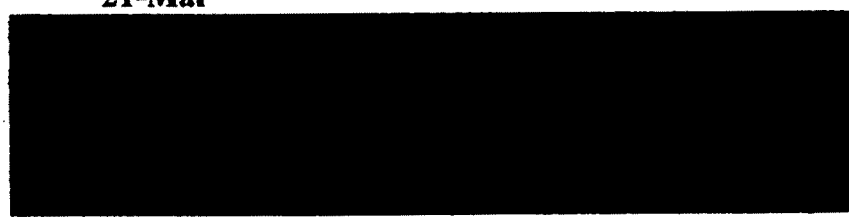
"PCM's Compliance with Subpoena Items C.10-C.14

During the February 15 phone call, we did not agree in which folders PCM should look or not look for e-mails called for by Items C.10 through C.14 of the subpoena. We are willing to consider, however, the use of a key-word search *through all backup tapes* and servers where e-mails are stored. The details of this key-word search would be confirmed by staff's letter addressed to your firm
and PCM's independent vendor hired to retrieve and produce the subject e-mails. To avoid any misunderstanding how the search would be conducted, we propose that the details be worked out during the Monday telephone conference. **[Eric warns that staff got burnt by Fried-Frank when we tried to be accommodating]"**

Gary

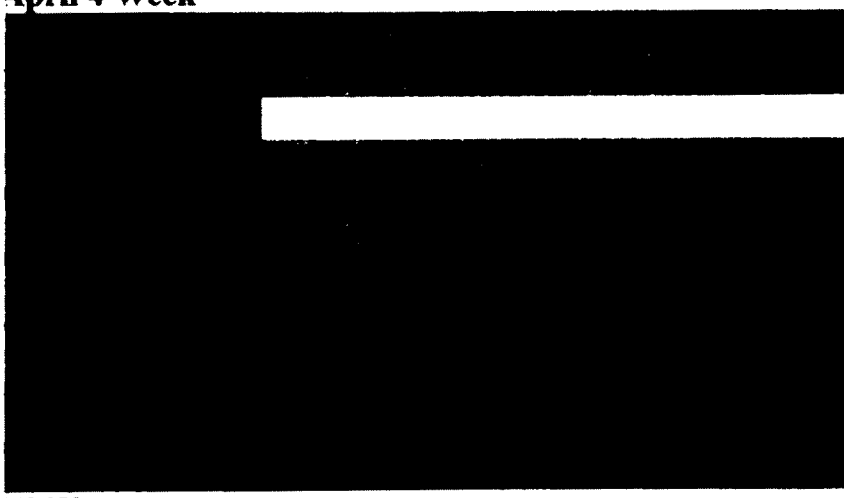
Witness	Testimony Date	Time	Doc Production
[redacted]			

Weekend
21-Mar



Weekend
28-Mar

April 4 Week



From: Aguirre, Gary J.
Sent: Thursday, March 10, 2005 4:09 PM
To: Berger, Paul; Kreitman, Mark J.; Hanson, Robert
Subject: PQ Bullet Points

- Emails of Pequot employees
  - Only current e-mails produced, none from backup tapes.
  - Fried-Frank did not start to search until after production date
  - Did not *begin* to look for six weeks after receipt of request
  - OCIE says original request could have been done in a month
  - Now were at 3.5 month, still nothing from backup tapes.
  - Bottom line: Get it to us immediately.

- E-mails-issuers—effectively refusing to produce
  - We agreed they could search e-mail boxes for key terms, rather than review every e-mail in every box
  - FR says three things: subpoena does not ask for it, staff agreed FF did not have to do, or Pequot cannot do
  - Subpoena clearly asks for e-mails and instant messaging.
  - Many staff letters ask for these e-mails
  - Bottom line: Key point: Fried Frank saying it does not want to restore e-mail boxes, which would allow search.

Pequot employee Examination
  - Delayed already because Pequot took two months to ID Pequot employees
  - February 14: we gave 4 -6 weeks notice for exams.
  - Fried Franks has blown much smoke, but not specific why exams should be delayed.
  - Our position: we would listen if they got specific about conflicts.
  - We did not hear from FF for two weeks.
  - They ignored our request specific calendar conflicts
  - reversed our schedule for the examinations
  - stretched three week schedule into seven weeks.
  - Bottom line: we set schedule and they provide hard dates when no one can cover

- Order Entry Times.
  - December 27: original request
  - Repeated by letters of January 14, February 22, during our face to face meeting on January 18, and many phone calls.
  - Subpoena also asks for: All electronic data maintained by Pequot on its EZE Caste or Hedgeware software systems from January 1, 2002, through December 31, 2004, or in the alternative, an Excel spreadsheet containing

the fields of information described in Appendix D for all publicly traded securities from January 1, 2002, through December 31, 2004;
  - By FF letter of January 28, 2005, they offered to produce this information, but to this date have failed to do so.
  - Pequot now conditions the production of this information upon our agreement "that Pequot's efforts to create this document for the Staff's benefit and convenience, and other such similar voluntary acts by Pequot, will be credited by the Staff as voluntary acts of cooperation."

- Pequot Employees Making Trading Decisions and Contacting Issuers
  - Issue: have they provided all those called for by our November 24, 2004, letter?
  - Multiple requests after letter
  - Did not begin process until date it was due.
  - Also repeated requests that they provide Rule 204-2(a)(3) info
  - Discrepancy between people on list who Pequot said made decisions and records required by Rule 204-2(a)(3)

- Pequot says staff agreed "prior production should have satisfied the Subpoena" with two exceptions and thus Fried Frank will not be producing additional documents called for Items C.1-C.3, C.5, C.15-17, and C.21.
  - No way
  - FF getting cute: When FF complained that new documents called for by subpoena, we pointed out that this should not be the case, because subpoena narrower than original request

- Cut off date for the subpoena. (minor issue)
  - FF claims we agreed to "cut off date."
  - FF does not want to produce info between date of our request (11/24) and subpoena (2/7)
  - Bottom line: FF knows there are more referrals and thus does not want us have current info called by subpoena.

From: Aguirre, Gary J.
Sent: Tuesday, March 15, 2005 3:12 PM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Ribelin, Eric; Conroy, Thomas; Glascoe, Stephen; Foster, Hilton
Subject: Pequot: a prodcutive call with FF

I had by far the most productive call with Kevin Harnsich about a half hour ago. We discussed every issue of concern and here's the current status:

1) **NY exams.** FF would like us to take testimony in New York.
2) **Email restoration.** The process works as I discussed in my earlier e-mail. They have "already finished restoration process or will finish it shortly." That leaves on more step: to put the files in PST archive where the key word search can be conducted. This issue now is which folders will take the next step: 27 folders (what FF wants to do) or all folders, what KH said he recalls Mark would like to do. I asked KR how much more time to do all rather than 27: he said he would know today. My take: they will do all with a little nudging.
3) **E-mail review:** They are now willing to do e-mail key word searches through restored e-mails. What they don't want to is to turn over all of the restored e-mail boxes to us. KR was telling me that we would have too many duplicative e-mails.
4) **Exam dates**: will let us now tomorrow.
5) **Questions for Onsite:** They will set a meeting; I agreed to send both KR and Noah Berlin questions by e-mail tonight.
6) **3/14 letter**: does it really mean all e-mails called for by 11/24 letter or just those in subpoena?
7) **Schedule a time on March 21 Regulation 204-2(a)(3):** will set during our next call which is scheduled for 11:30 on Thursday.
8) **Privilege log:** will try to let us know when FF will have during call on Thursday.
9) **Items C.18-C.20:** status: will let us know when non-privileged docs will be produced.
10) **Double deletes:** will do key word searches through all restored e-mails to locate.
11) **Will FF continue to ID Pequot employees who made decisions:** Yes.
12) **Purely personal e-mails:** They are producing.
13) **Cut off date for subpoena:** he's going to check to see if production per subpoena can be made by 4/10.
14) **Order entry times:** They are producing a document on an Excel worksheet with the Eze Castle data.

I will send confirming letter.

Gary

From: Aguirre, Gary J.
Sent: Wednesday, March 16, 2005 12:28 PM
T : Hanson, Robert; Foster, Hilton; Ribelin, Eric; Conroy, Thomas; Ivarone, Jason; Plimpton, Scott
Subject: Today's Pequot meeting

I will not circulate an agenda for today's meeting since the focus will on one objective: prioritizing the review of the documents, e-mails and instant messaging that we now have or will soon receive to get ready for the upcoming examination schedule. Who will look at what?

These documents include those of:

1) Broadview;
2) Blue Coat
3) DJO
4) Pequot

Pequot's breakdown as follows:

1) E-mails now on Iconnect;
2) E-mails about to go on Iconnect;
3) E-mails that will receive that need to go on Iconnect;
4) Phone records going on Iconnect;
5) Various documents that relate to trading decisions;
6) Various documents that relate to compliance issues with 204A or 204-2;
7) Instant messages that are going on Iconnect.

Gary

From: Foster, Hilton
Sent: Wednesday, March 16, 2005 10:59 AM
To: Aguirre, Gary J.
Subject: RE: Pequot: key letter confirming call yseterday

The emails paragraph ; should you state an end date so that the time period is clear? I know you have a catch all at the end stating that dates in subpoena govern, but it might be helpful to clarify our understanding of what was said yesterday

---

From: Aguirre, Gary J.
Sent: Wednesday, March 16, 2005 10:50 AM
To: Kreitman, Mark J.; Hanson, Robert; Plimpton, Scott; Ivarone, Jason; Foster, Hilton; Conroy, Thomas
Cc: Ribelin, Eric
Subject: Pequot: key letter confirming call yseterday

For those of you that don't know, I had a telephone conference yesterday afternoon with Kevin Harnisch during which we broke much ground in getting the e-mails, documents and other info we have been seeking in this investigation. I have the following questions and comments for you:

Mark and Bob: We need to discuss language in bold below.

Tom and Hilton: Anything left out or inaccurate below?

Scott or Jason: Is my tech talk in e-mails OK?

Dear Kevin:

I confirm below my understanding of the matters discussed yesterday during our telephone conference. Since I expect to discuss these matters with other staff members today, I would appreciate your prompt response if you believe that I have inaccurately or incompletely stated the points below. This also confirms our conference call for 11:30 tomorrow.

Initial Investigative Testimony: You expect to inform us today of proposed dates for the testimony of PCM employees in accordance with our conference call last Thursday. I expect to have an answer by tomorrow whether we agree to take the testimony of PCM employees in New York.

Emails: You stated that the backup tapes containing the e-mails folders for the period from January 1, 2001, have been nearly restored to exchange servers. One question you raised yesterday is whether PCM must restore all e-mails from these servers or only those for twenty-seven PCM employees. Since the e-mails sought by subsections C.10 through 14 and C.18 through C.22 are not limited to certain employees, a review or perhaps a search (if we can agree upon the terms) must be conducted through all e-mails

folders. Further, since PCM's system did not preserve "double-deletes," a similar review or search must be conducted.

In response to your inquiry, our letter of March 14 seeks not only the e-mails described in our February 7 letter but those sought by our November 24 letter as well. I am preparing a second subpoena for those documents, in accordance with our February 8 letter. Finally, you informed us that documents considered "personal" will not be withheld from PCM's production.

OnSite Questions: In accordance with our discussion yesterday, I have e-mailed a list of topics I would like to discuss with OnSite representatives,

March 21 Conference Call: We will fix a date for this conference call during our call on tomorrow.

Privilege Log: We understand that you will try to set a date tomorrow when we can expect to receive the privilege log.

Items C.18-C.20: Your February 28 letter stated: "We will produce remaining non-privileged documents and redacted documents upon completion of that review." We are asking that you inform us tomorrow when you expect to produce these documents.

Updates to Appendix A to your January 28 letter: We understand that PCM will continue to update the list of PCM employees who were involved in trading decision or who had contact with issuers as requested by our letter of November 24, 2004.

Cut off date for subpoena: The language of our subpoena controls the period for which documents are sought.

Trading data: PCM will provide an Excel worksheet containing a field for order entry times as well as much of the trade data contained on the trade blotter delivered in December.

Cordially,

Gary J. Aguirre
Senior Counsel

From: Aguirre, Gary J.
Sent: Friday, March 18, 2005 8:49 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: Pequot Tactics to deal with yesterday news

Given the input from OnSite yesterday (impossible for FF to provide issuer e-mails by 4/10) and some further thought, I propose the following tactical approach to get the e-mails we seek from FF. It also maintains a consistent position and undercuts FF's ability to create chaos during the call with Paul. Incidentally, I think KH's inquiry on Tuesday (are we really seeking compliance with our 11/24 request) was intended to set us up for the next call with Paul. I also think it would get very nasty before Paul if we tried to say at this point that FF agreed to produce the issuer e-mails by 4/10. The reasons are also stated below. I suggest that we:

1) Indulge FF by going along with its narrow interpretation (though disputing it) of the 2/7 subpoena, i.e., that it only calls for e-mails from 12 PCM employees and not issuer e-mails;
2) Subpoena the remaining e-mails of the 27 PCM employees with a return date of April 25. My 2/8 letter said we would do this and OnSite says this timetable can be met.
3) Subpoena the issuer e-mails for production on May 17. This gives FF and OnSite 2 months (If we accept FF's theory of the 2/10 call, it lost 5 weeks). In the covering letter, we would point out 1) that the 2/7 subpoena clearly called for these e-mails, 2) that FF's statements that searches could not be conducted has been clarified by OnSite statements on 3/1 and 3/17 that they can, and 3) that we are narrowing the scope of the 2/7 subpoena to include only e-mails of investment staff identified in an attachment, and 4) that we are providing search terms to further simplify the process (search terms would be ticker symbols and issuer e-mail domains).

In general, FF claims it does not have to produce issuer e-mails because 1) subpoena does not call for them (absurd: subpoena asks for documents and defines documents to include e-mails) and 2) a comment made during the 2/10 phone call (not by me) which effectively withdrew these e-mails from the subpoena. By my letter of 2/11, I suggested that Pequot could comply by doing key word searches. By its letter of 2/14, 2/22, and 2/28, FF said key word searches could not be done. Neither the phone conference of 3/10 nor our follow up letter explicitly challenged FF on this point. Yesterday, I confirmed FF's position during the call with Onsite; FF has not taken a single step to

produce the issuer e-mails. They are sticking by their guns that they were relieved from complying with the issuer related e-mails at the 2/10 telephone call.

There were some other new and notable input from Onsite during the call . First, they could put all e-mails for the 27 PCM employees identified in response to our 11/24 letter into PST format by late April. They also made a statement that they have provided FF with 890,000 e-mails, which represents about 60%—by my calculation--of the total emails for the 27 PCM employees. This means they will produce about 1.5 million e-mails for the 27, almost four times their estimate on January 18. My suspicion: they have retrieved e-mails for more people than they are telling us about. I think we need to get these guys on the record for two reasons: to resolve these inconsistencies in their statements (what have they done?) and to set up grounds for possible subpoena enforcement proceeding.

Your thoughts?

Gary

From: Aguirre, Gary J.
Sent: Tuesday, March 29, 2005 9:19 AM
T : Hanson, Robert
Cc: Ribelin, Eric
Subject: Ho 9818 Bob: we need to discuss this letter

Bob:

As I mentioned yesterday, Kevin Harnisch called to give a status report on e-mails. Eric was in on the call. KR's key points were:

1) April 10 deadline. FF claims they cannot comply with the 2/7 subpoena by 4/10.

2) Pequot employee e-mail. FF cannot meet the 4/10 deadline for employee e-mails called for by the subpoena (approximately 1/7 those sought by our original request). Instead, FF will deliver employee e-mails two weeks before exam date (this will not allow meaningful review by us before exam). This also links document production to testimony dates. Given current exam schedule, this extends deadline to May 20 for all employee e-mails.

3) No issuer e-mails will be produced until all employee e-mails are produced.

4) FF will do search through data base, not OnSite. This means any questions about integrity of search dead ends into attorney client privilege.

5) Despite your request during a call last week and my written request, FF did not produce a privilege log. When asked about the log, KR was evasive.

My suggestion:

1) Send letter below;
2) Track down who (Director, Associate Director) made decision in *Bank of America Securities* that law firm could not indefinitely delay production by claiming it had to review each document.
3) Develop strategy to get privilege log.
4) Nudge FF away from idea that it does the search (I was able to do this with Kirkpatrick and the net result were e-mails)

XXXXXXXXXXXXXXXXXXXXXXXXXXXXx

Dear Kevin:

I wanted to get back to you promptly regarding the proposals you made yesterday to further modify the terms by which Pequot Capital Management ("PCM") may comply with our February 7 and March 22 subpoenas. Specifically, during your call, you proposed the following modifications to our March 10 understanding regarding our February 7 subpoena:

1) PCM will deliver the e-mails responsive to subsection C.6 of the subpoena for a particular witness two weeks before his scheduled testimony; and

2) No e-mails will be produced in response to subsections C.10 through C.14 or in response to subsections C.18 through C.20.

We believe PCM has had ample time to fully comply with the terms of both Feb 7 subpoena. Accordingly, we do not believe that any additional extensions are warranted.

You also indicated additional time will be required to comply with our March 22 subpoena which schedules a May 6 production date. We are willing to discuss a short extension of that production date if we are able to agree in principle how the review can be expedited. Until then, the May 6 date remains in effect.

Your cooperation in this matter is appreciated.

Cordially,

Gary J. Aguirre
Senior Counsel

From: Aguirre, Gary J.
Sent: Wednesday, April 13, 2005 8:20 AM
To: Hanson, Robert
Subject: HO 9818: reissuing the subpoena for issuer e-mails, Patel and Onsite Subpoenas, and more on 204 issues

Bob:

It's hard to keep the entirety of this case in mind when we have our discussion how certain tactics may advance the case. So, I would like to return to one of the issues we discussed yesterday. While there is much evidence and conduct by FF suggesting they are withholding e-mails, one particular position taken by FF along with FF, Pequot and OnSite leaves no doubt. I am referring issuer e-mails which were called for by subsections C.10—C.14 of our attached 2/7 subpoena (which defined documents to include e-mails and instant messaging) as well as our 1/3 letter request (see attached).). Similarly, subsections C.18 through C.20 call for compliance related e-mails.

Our efforts to get or pin down FF regarding these e-mails have been ongoing since January 3 request. I have attached the e-mails that explicitly deal with the issue. Two one authored by Mark. The rest are mine. You and I worked on the last one which simply asked FF to notify us of their position by 2/5, which they did not. It read, 'C.10--C.14 and C.18–C.20 E-mails: Your letter of April 1 reads, "In your March 29 letter, you state that I proposed 'PCM be excused from producing e-mails called for by subsections C.10 through C.14 and subsections C.18 through C.20 until all e-mails referred to in paragraph 1 above have been produced.' I did not make any such request." I am requesting a clarification. Has PCM now decided to produce the above e-mails by the April 10 deadline pursuant to our March 10 understanding? If not, please advise us of your position in this regard by the close of business on April 5." FF ignored it. They do not want to tell us their theory for refusing because it can be easily cured.

However, both KR and OnSite have told me nothing they have done nothing to produce these e-mails when we last spoke.

These are by far the most important e-mails since they relate directly to the SRO referrals that are the subject of this action.

I recommend the following:

1) Subpoena again the issuer e-mails, but without using the term "document," with its definition to include e-mails;
2) State in cover letter that they have made claims from time to time that they did interpret prior subpoena to include. We disagree, but avoid any further confusion we will subpoena again. Mark had suggested we do this earlier, but it go superseded by Paul's call
3) Subpoena Patel (I have asked FF to accept service) and OnSite (would like to discuss further).

4) I believe these are both critical, but suggest that we get Patel nailed down first and then go after Onsite.

Where does this fit in with Bank of America Securities, Section 204, and 204(a)(3) and 204(a)(7)? FF's refusal to produce triggers 204, if it has been done correctly. Further, C.14 asks for the following, "Any note, report, analysis or other document considered by the trader, account manager or any other person who participated or was otherwise involved in the decision to trade in the securities of the fourteen issuers specified in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C." This is exactly what was covered by Rules 204-2(a)(3) and (7) if my take on Zion Capital is correct. If Zion does not help us on the Rules, the e-mails exist and thus 204 is operative.

I'll call you later.

Gary

From: Hanson, Robert
Sent: Monday, April 11, 2005 8:33 PM
To: Aguirre, Gary J.
Subject: Re: Getting through the FF nonsense

Some preliminary thoughts.

What would be the basis for obstruction of justice? Do we know the specific time periods of the missing tapes? How do we know sanberg made the trades? What makes us think that they use e-mails to trade?

I would write a memo from you to paul and mark about the missed deadline and then follow up with a detailed letter to ff, including the last minute production.

Sounds like a good idea to talk with the internal it people at pequot though at first impression not as interested in vendor testimony.

Don't understand the chase e-mail situation fully. Is he someone we asked for all e-mails from?

A memo laying out our basis for 204 violations would be helpful before the meeting-- that way we have something to review and then discuss.

Again, just preliminary thoughts, subject to revision with new information clarifying the points you made and/or my understanding of them.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. [redacted]
To: Hanson, Robert [redacted]
Sent: Mon Apr 11 17:41:12 2005
Subject: Getting through the FF nonsense

Fried Frank continues its "no holds barred" strategy and tactics to frustrate our investigation. They have ignored the 4/10 deadline Paul gave them on 3/10. Some of the actions by FF and Pequot may have crossed the line to obstruction if justice, and the deadline he gave them.

Compliance related documents and e-mails

I originally requested these documents in November and again in January. I subpoenaed them and then requested them six more time, including my final letter on 4/6 (see attached). Two boxes of documents were finally delivered to the Commission late Thursday afternoon and to my office about 20 minutes before the examination of Pequot's compliance officer. These FF games cause much wasted time. I must carefully review the files to see if the docs are there. If they're not, I send a letter. I still have to review the docs they have

produced to get ready for the exam. When the docs get to my office 20 minutes before the exam, I cannot review them before I examine the witness.

GE-Heller Financial

There are approximately 12 to 15 tapes containing e-mails requested by our November letter and our subpoena which have vanished. Twelve involve the New York office during 2001, a large chunk if not all the backup tapes for this office for this year. More than likely, these would include e-mails relating to GE's acquisition of Heller Financial, which was announced on July 1. One GE officer already went to prison for divulging insider info in this matter. Pequot's had a $6 million dollar profit on extraordinarily well timed trades. But what makes it even more interesting are the following: All trades were directed by Arthur Samberg, founder and primary principal, without help from any Pequot staff person. Samberg also claims he had no contact with GE or Heller before executing the trades, a violation what he told the media was his customary practice. GE's counsel told me last week that Fried Frank has contacted them to inquire if we had subpoenaed documents relating to this transaction.

Employee e-mails (subsection C.6 of our 2/7 subpoena)

Pequot take's the position that the 4/10 deadline means nothing for the C.6 e-mails, e-mails of the employees it identified as the decision makers. Rather, it will produce these e-mails 2 weeks before each exam. This makes Paul's 4/10 deadline meaningless.

What is Pequot delivering 2 weeks before the exam?

The Chase "e-mails" arrived last week, two weeks before his exam. We got two boxes of what looks like medical textbooks. To the extent that we get e-mails, most are not in time frames or individuals sought by our subpoena. So, what are the sending us. The backup tapes containing the e-mails we sought by our 11/24 letter are in 150 backup tapes. Pequot gave OnSite over 600 tapes. Just as PP gave us hardcover fill in January, they are doing the same now with e-mails. It sounds goods: we gave you hundreds of thousands of e-mails.

E-mails responsive to C.10-C.14 and C.18 to 20.

So far Pequot has not produced them and has not responded to my letters inquiring why. These are by far the most relevant e-mails.

Lack of e-mails or documents relating to trades in issues.

We see few to no communications directing trades to be executed. Are they being withheld like the compliance documents? By the way, please see my e-mail on Zion Capital; it may give new life to 204-2(a)(3) and (7).

Privilege log

None produced despite repeated requests.

So what do we do:

Preliminary Step 1?

We have had success getting documents from FP only when got them nailed down and risks of non production outweigh the risks of production. The same is also true in reverse. To pin them down, we need to take the exam of Shash Patel, the internal Pequot IT chief, because he collected all e-mails, discovered missing e-mails, and is the author of the Pequot theory why they are missing. He could tell us what was delivered to OnSite.

For many of the same reasons. We need to take OnSite's exam. For which Pequot employees have they retrieved e-mails? How many retrieved? Have they kept a log? This puts us in a position to know what went into Pequot and compare it with what's coming out.

Preliminary Step 2

I intend to set a meeting next Monday to evaluate BOAS application to the facts here. Gene (OC) and Barbara (IM) unequivocally agree that we have access to all Pequot's existing records under 204. Section 209 makes each violation expensive, $50,000 a piece if not willful or $250,000 for each violation Further, I have found a case, Zion Capital Management, favorably addresses both issues I sensed were a concern to IM. Kevin O'Rourke also expressed some interest in this approach.

From: Aguirre, Gary J.
Sent: Friday, April 22, 2005 10:45 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: RE: Countering FF's game plan

Bob:

I agree that is the next step, but I thought it might be helpful to give you some time before Monday to mull over what seems to be FF's game plan.

Gary

From: Hanson, Robert
Sent: Friday, April 22, 2005 10:40 AM
To: Aguirre, Gary J.
Cc: Kreitman, Mark J.
Subject: RE: Countering FF's game plan

When you get back in the office, I would like to work with you and prepare an executive summary of where we are with Paul.

Let me know if that works for you.

Thanks,

Bob

From: Aguirre, Gary J.
Sent: Friday, April 22, 2005 10:03 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: Countering FF's game plan

I am becoming more convinced that we should now focus all energy and examinations on getting e-mails and other relevant documents from Fried Frank. The investigation of the underlying insider trading case should be deferred until we have them.

Please excuse me for waxing philosophically about Pequot, but that's the level where I believe the analysis must begin. Pequot sees itself as a wholly unregulated entity running free in the financial markets. It believes its registration as an investment adviser is pretty much meaningless, since these regulations don't really apply to it. They were designed for a conventional investment adviser who provides "advice" to its clients. Accordingly, unlike other financial institutions handling the public's money, it need not maintain records how and why it made trading decisions. If it did create these records, they were created inadvertently and just as inadvertently can be deleted. This seems to be the unspoken policy that guides Fried Frank in its efforts to thwart this investigation. From FF's point of

view, the worst case scenario is that we seek to enforce our subpoena, which is highly unlikely given recent history. If we do bring the action and prevail, they pay a thousand dollar find and turn over the records. So what's the point of giving up any damaging documents so long as there is the option of hanging on to them?

Until we have the relevant e-mails and other documents that relate to the trading decisions in issue, we can do nothing more than pin down Pequot's portfolio managers to a story. Those stories will be vague where they need to be and precise where supported by favorable documents that FF has produced. Meanwhile, we will not lay a glove on Pequot players who made the trading decisions. I believe this is also part of FF's strategy. Here's what I see coming: Stanley Sporkin sits through the exam of Jerome Chase, the portfolio manger that made decisions to trade in DJO. Since FF has produced only one relevant e-mail--a good one for Pequot, Chase looks clean. Sporkin become an advocate that Chase and the Healthcare Group are clean. But Sporkin and Weil Gotschall are only one of six new law firms FF brought in. In June, the six law firms plus FF become chorus to Paul or further up the chain: Pequot and its players are clean. We say: but they did not give us all their documents. They counter: we gave Staff 500,000 e-mails and other documents.

At a very basic level, *Bank of America Securities* offers a lesson here. At some point when you are bogged down in getting the documents in an insider trading investigation, you stop the underlying investigation and focus your energy on getting the documents. I believe we have reached that point. We are at the perfect point to say "enough is enough." We have now had full production for four Pequot employee scheduled for exams, according to the way FF sees the 3/10 agreement. Here's what FF has done:

Cutler (compliance officer): Despite our request that goes back to November, specific language in our subpoena, and a half a dozen or more letters seeking documents related to Cutler's exam, they held back producing the key documents until the night before the exam. They arrived at my office 20 minutes before the exam. Further, there is little reason to believe these are all documents or even the most relevant.

Chase: One relevant e-mail produced. The most relevant documents produced the day before the exam. Key periods of calendar have vanished, but FF's IT experts are on the trail of Chase's calendar. What happened to April 10 or the two week minimum?

Greener Exam: Scheduled for Thursday, but cancelled. No DJO e-mails before exam and no calendar.

Samberg: CD of e-mails delivered on 4/19. Samberg made decisions by himself on Heller Financial. Not a single relevant e-mail relating to these trading decisions.

Added to the above of course is FF's general failure to live up to the March 10 understanding with Paul.

I think we should now focus all energy on FF's failure to produce documents per subpoena and earlier requests. I am still awaiting feedback from OC and IM on 204 and 204-2, but we may wish to proceed on existing analysis of those sections.

Gary

From: Hanson, Robert
Sent: Tuesday, April 26, 2005 5:24 PM
To: Aguirre, Gary J.
Subject: RE: Missing tapes

Not bad for a day's work

From: Aguirre, Gary J.
Sent: Tuesday, April 26, 2005 5:24 PM
T : Hanson, Robert
Subject: RE: Missing tapes

They bought from July 2 to July 27; announcement on July 30; and sold on July 30 for $16.7 million profit.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

From: Hanson, Robert
Sent: Tuesday, April 26, 2005 4:21 PM
To: Aguirre, Gary J.
Subject: RE: Missing tapes

When did they get in to Heller?

From: Aguirre, Gary J.
Sent: Tuesday, April 26, 2005 4:14 PM
To: Kreitman, Mark J.; Hanson, Robert
Subject: Missing tapes

I have pasted below some interesting excerpts from transcript of the testimony of Lawrence Cutler, Pequot's compliance officer, regarding the missing tapes. His number of 12-15 tapes was only a guess of at the total number of missing backup tapes. However, his attorney, Robert Cutler, told me Cutler would be prepared to testify regarding the missing and I told him what I would be asking about. In short, the 12-15 missing tapes is likely on the low side. Also, this number did not include unreadable tapes. The time period of the missing tapes was from May of 2001 through May or June of 2002. Pequot got in and out of Heller Financial in July of 2001.

9 Q Okay. Let me rephrase that. Were they all from

10 one office, or were they from multiple offices?

11 A I believe they were from different offices.

Q Okay. Was there any single office which seemed to have a larger number of missing tapes than the other offices?

A Yes.

Q Which office was that?

A The New York office.

MR. ANELLO: One moment.

MR. AGUIRRE: Let the record reflect that Mr. Cutler and his counsel are consulting.

(The witness confers with counsel.)

BY MR. AGUIRRE:

Q Are you finished consulting with your counsel?

A I am.

Q Okay. What did Shash tell you about missing tapes?

MS. STRAUSS: And just to be clear, excluding any conversations with Shash that were also in the presence of counsel and with counsel. So just think about those conversations you had with Shash that were not conversations together with counsel, if you can do that.

BY MR. AGUIRRE:

Q Was counsel always with you when you spoke with Shash about this matter?

A No.

Q Okay. I want you to focus on the conversations with Shash. Did you ever just ask him in a dialogue between the two of you or other people from Pequot whether there were any missing tapes?

A Yes.

Q What did he tell you?

A That there were tapes -- there were a few tapes that were missing or there was some tapes that -- I believe that were either missing or not readable.

Q Let's take the missing tapes first. How many missing tapes?

A Generally, I mean, I don't have -- probably, I'm guessing, somewhere between 12 and 15 tapes, I would assume.

Q And going back to my last question, a larger number of those were missing from the New York office than other offices; is that right?

A That's correct.

Q Do you remember how many missing tapes there were from the New York office?

A Approximately 12.

Q Do you have any understanding of what time period was covered by those 12 missing tapes?

A Yes.

Q What time period?

A I believe it was somewhere around May of '01 through May or June of '02.

Q Now, the tapes that were missing from the New York -- the missing tapes that we have attributed to the New York office, is it your understanding that those tapes would have related to e-mails either coming into or -- to or from Pequot employees in the New York office?

A That is my understanding.

Q Is anyone trying to track down those tapes?

A I believe they have tried to track down those tapes.

Q Are they still searching, or has it been decided that the search has continued long enough?

A I believe they have ceased the search at this point.

Q Is there any explanation where the tapes are missing?

A Only speculation.

Q Well, has anyone discussed -- have you had any discussions with anyone other than your attorneys about the missing tapes?

A Shash.

Q And what have you and he discussed about the misses tapes?

A Basically, that it appears that the tapes that were being utilized as the source of backup information were overwritten during that period of time.

From: Aguirre, Gary J.
Sent: Friday, May 06, 2005 12:08 PM
To: Hanson, Robert
Subject: HO 9818

When's a good time for you to talk?

I believe the key points of Samberg's testimony are

1) His reason for buying Heller Financial boils down to:
    1) Economic factors were converging positively for Heller;
    2) Heller had 10% growth rate and analysts thought this would continue;
    3) Analysts and media saw Heller as acquisition target.
2) He cannot recall discussing Heller Financial with anyone at Pequot before investing $40 million. This is curious because Pequot had people that followed credit markets and, in general, the best brains money could buy. "Was there no one at Pequot whose counsel you valued on the Heller purchases?" His answer was basically no.
3) Cannot recall discussing with anyone from Heller or GE and no e-mails/docs relating to any contacts. This is contrary to the way Pequot does business.
4) Cannot recall discussing with anyone outside Pequot and no e-mails/docs. Also contrary to the way Pequot does business.
5) Claims he saw some analyst's article and news suggesting Heller was GE target, but cannot ID any articles he saw. Newspaper article a couple of years before quotes Samberg saying he does not consider Wall Street analysts. Further, his testimony suggests that his attorneys spoon fed him his current line. When I began breaking down the reasons he bought Heller, he eventually said there was nothing about Heller that caused his decision. It was actually what was going on at Pequot.
6) Bottom line: his current story is backed by nothing that has been produced and makes no sense.
7) How far will Fried-Frank and Wachtell-Lipton go to create Samberg's story? During a call, Martin (Wachtell-Lipton) told me concrete version why Samberg bought Heller: Samberg saw the WSJ article, saw an analysts report, did some technical analysis, and relying on his experience, decided to buy. I questioned Martin about this tale and his answers made no sense. The story was dropped by the time Samberg testified. My point: these guys will create the evidence to support a story. I think Fried Frank and Wachtell Lipton have cooked up the entire story that Samberg gave us and then showed him the research that supported, which he parroted back during his testimony.

The keys to Samberg:

1) We know GE decided to go ahead with Heller in May 2001 and Samberg made his buy about six weeks later. We need to focus on Samberg's calls, e-mails and instant messaging during this period. I am unconvinced we

have all of them. I know we don't have his instant messaging which he says he exclusively used to communicate with important people;

2) Samberg identified several people he could have talked to during this period. Both Hilton and I think this may have been his way not to perjure himself. One was with Merrill. Merrill knew about the acquisition in May 2001. It also received 3 times more ($16 million soft and cash) in commissions than any other Pequot as any other B-D in 2001.
3) In general, I think Samberg could be a horror show for Audrey. He is not used to being told what to do or say and therefore is not very coachable. His arrogance also shined through during his examination. For example, I asked him if Pequot uses due diligence to research a stock before buying it, and used GE as an example. (Why? If you have a due diligence policy, was it followed when you purchased Heller?) He gave me a lecture why due diligence has nothing to with Pequot's decision making, and basically said GE was not concerned with Pequot's due diligence. I have a lengthy Pequot memo, given to Pequot's investors, describing how it uses due diligence in making its investment decisions and a specific due diligence statement that Pequot gave to GE.

Gary

From: Aguirre, Gary J.
Sent: Monday, May 09, 2005 4:54 PM
To: Florschutz, Lesley
Cc: Kreitman, Mark J.; Hanson, Robert
Subject: Request for Contract Paralegal

Hi Leslie:

By this e-mail, I request that a contract paralegal be appointed to this matter. I summarize below the multiple factors which I believe justify such action. In this matter, Staff is investigating 18 possible insider trading matters–all referred by SROs after they conducted their own investigations. The trading under investigation was done by one of the largest hedge funds in the US. The case is evolving into one of the largest insider trading investigations in recent years.

The volume of electronic and hard copy documents being produced in this matter ranks as one of the largest in recent Commission history. I have currently subpoenaed electronic and hard copy production from 21 parties to the investigation. Cumulatively, they have produced approximately one million hard copy and electronic pages. At this point, I expect over four million documents to be produced in this matter. Those documents must be reviewed and organized to be a factor in this investigation.

In its letter of April 29 (attached), the law firm representing the hedge fund, just one party to the investigation, states that it is now producing 80,000 electronic records and 300,000 pages per week. The letter goes on to state that it has 5 partners, 15 associates, 4 paralegals and 35 contract attorneys working on this matter, a total of 59 attorneys and paralegals from one law firm. According to the letter, the contract attorneys are working 6 days a week, 10 hours a day reviewing documents.

In addition to the law firm representing the hedge fund, there are 6 other major law firms representing the hedge fund's employees. All of these law firms have produced or are in the process of producing voluminous additional electronic and hard copy documents. Each of the law firms has several attorneys and, we believe, additional paralegals working on this matter.

In addition to the hedge fund and its employees, there are 17 other parties producing documents. These parties include some of the largest corporations, e.g. General Electric, in the US and are naturally represented by some of the largest law firms. Last week alone, I received 12 boxes of documents and 24 CDs of electronic documents, over 100,000 documents. I was unable to review these documents since I was in New York taking testimony. Further, almost all are "rolling productions" pursuant to currently outstanding subpoenas and thus the document production will continue during the next 3 months. Over the next 10 days, I will be issuing additional subpoenas to new parties calling for the production of documents. Hence, the document production per week will likely increase.

As with other insider trading cases, it is necessary to establish contact between the suspected tippers and tippees. Finding telephone contacts at critical dates and times is one of the traditional ways of establishing the link. In this case, we are dealing with 21 institutions and thus the task of reviewing phone records is an enormous one.

In addition to the above factors, the organization of documents in this matter is critical because I am working with staff members outside of my branch and outside the Division of Enforcement, which include OEA, OC, IM, IT and Market Surveillance. Other staff members must have access to these documents and hence they must be organized in a way that they are accessible to others.

I am the only full time staff member assigned by my AD to this matter. I have requested the assistance of our assigned paralegal, but she is backlogged with other matters. A senior staff member from a different section of Enforcement has provided some assistance with document review, but he will not be available in two months. As of today, I understand another attorney will be working with me on this matter.

My other responsibilities in the case prevent me from dedicating my full time to the review of documents. Among these responsibilities are the following:

- initiating and responding to all correspondence, including investigative correspondence, with the 24 law firms involved in this matter;
- preparing for and taking the numerous testimonies of the employees of the parties to this investigation;
- working with our IT staff to correct the frequent deficiencies in the electronic data submitted by the parties to this investigation;
- preparing status reports to my superiors at the Commission;
- communicating with and coordinating the investigation with staff members from other offices and divisions of the Commission, including Market Surveillance, OEA, IM, OC and IT.

Time period: I would expect the time period to be approximately 4 months. We would of course prefer that someone begin as soon as possible. We expect that the voluminous hard copy and electronic document production will continue over the next 3 months, and it would likely take an additional month to organize and review those documents after the last delivery.

Thank you for considering this request.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

From: Aguirre, Gary J.
Sent: Tuesday, May 10, 2005 10:36 AM
To: Kreitman, Mark J.
Subject: RE: HO9818: A recommended approach to take with FF

Yes

Gary

From: Kreitman, Mark J.
Sent: Tuesday, May 10, 2005 9:54 AM
T : Hanson, Robert; Aguirre, Gary J.
Cc: Eichner, Jim
Subject: RE: HO9818: A recommended approach to take with FF

yes

From: Hanson, Robert
Sent: Tuesday, May 10, 2005 8:37 AM
To: Aguirre, Gary J.; Kreitman, Mark J.
Cc: Eichner, Jim
Subject: RE: HO9818: A recommended approach to take with FF

Can we meet at 11:30 to discuss? Thanks.

From: Aguirre, Gary J.
Sent: Tuesday, May 10, 2005 8:09 AM
To: Kreitman, Mark J.; Hanson, Robert
Subject: HO9818: A recommended approach to take with FF

Bob and Mark:

I outline below my thinking how we should proceed with Fried Frank in connection with e-mail production. The simplest and safest solution from our standpoint is to get all e-mails and instant messages for all investment, trading and research staff from 1/1/2001 through the present. I think we should stick to this position unless FF demonstrates that it is unworkable. I summarize below hoe I get to this position.

I have also attached two Excel spreadsheets which summarize the documents we have received. The shorter one summarizes the documents we have received from the six law firms who represent Pequot employees. The other summarizes the documents we have received from FF since last November. I have highlighted the documents I have not yet reviewed or even organized. Contrary to the agreement struck with Paul on March 10, we have been inundated with last minute productions by FF and the six other law firms.

1) Issuer related e-mails: Everyone agrees that a key word search can and will be done, but disagree over the universe that will be searched. We proposed on March 22 letter that the universe include all investment, research and trader staff, approximately 110 positions for a one year trading period for each of the 14 transactions we are actively investigating. As a practical matter this would cover all e-mails from 1/1/2001 through 7/31/04. To understand FF's offer, you must understand Pequot's structure. "Analysts" (portfolio managers) follow a narrow class of stocks, e.g., Chase follows medical devices companies. Chase is part of broader group, the Health Group, headed by what Pequot calls a "portfolio manager" (which is really monitor). FF has proposed that that Pequot use each group as a mini universe, which would be searched using key word terms related to the particular issuer. Bottom line: This would be about 1/10 the size of our universe. FF has also proposed that we do not include "Research Support" staff. I think we should stick with our universe, which would be approximately 2.9 million e-mails, assuming the average daily e-mail volume of approximately 30 e-mails and that we do not include the Andor people who broke off from Pequot in 2001 (but not yet 100% sure second assumption is a good idea). My guess is that Pequot has produced about 800,000 e-mails, but that number should al least be cut in half because of duplicates. The real question is whether we want them to conduct key word searches or turn over the universe (see next).

2) Do we do the search or ask for the universe? Here are the pros and cons.

   a) Pros for getting the universe: If we ask for the universe, we can obviously get more and more creative with our searches. Doing searches is a process: the results of one search suggest the next one. Also, FF says it wishes to do the searches. For this reason alone, I would get the universe so we can do the searches.

   b) Cons: If we get the universe, FF will claim that it has to do a privilege review of each document, the real cause of the production delay. However, I think there may be a simple solution that makes more sense now than before. In *Bank of America Securities*, the Commission eventually demanded that BOA conduct a search to ID the privileged docs and turn over everything else. FF has tells me they now have a 5 page list of attorneys. Why not pull out the e-mails to or from these attorneys for privilege review and turn over everything else? I bet we could get Sporkin to lean on them to do this? One rub: FF is claiming attorney client privilege for some docs where an attorney was not involved. I asked them to bring these docs to the last session of Samberg's exam, since he sent one of these "privileged" e-mails to another employee.

3) Trader related e-mails. These are the e-mails that are called for by subsection C.6. We initially asked for 4 years for each person involved in the trade. Our 2/7 subpoena narrowed it to one year and 11 people, but we said we would serve a later subpoena that sought the rest. Our 3/22 subpoena did just that. If we ask that FF deliver the issuer related universe above, as opposed to doing a search, the trader related e-mails would be almost swallowed in that production, except for the period after 7/31.2004. We have four new referrals that we need to take a look at that would extend the time frame through 2/28/2005. Would it not be a better solution to propose that they give us all e-mails for the investment staff from 1/1/2001 through 2/28/2005?

4) Privilege Log: Audrey says they may have up to 10,000 documents to or from some 5 pages of attorneys. They would like us to agree that they need not produce a privilege log for certain types of attorneys, e.g., patent.

5) Samberg's Instant Messaging: Samberg said in an e-mail (2003) that he only used IM to communicate with a certain group of people. If they have these IMs, they have not been produced.

6) Compliance related documents: these would automatically be produced if we included the compliance people in the universe of documents that should be produced. If we don't get all e-mails, think the search words would have to be the names of people who would logically be involved in compliance related issues. I know who some are but not all.

7) Shea (?) letter: Audrey told me the other day that they could not locate e-mails for the period from 9/2000 through 1/1/01 and could we begin with 1/1/01. The discussions re Heller did not begin until May, so I said yes. Bob told me about the letter we send re limiting scope of documents where it's proposed by party being investigated. We may wish to send one to Audry and include this point.

Gary

From: Aguirre, Gary J.
Sent: Wednesday, May 18, 2005 4:04 PM
To: Hanson, Robert
Subject: RE: Pequot

Yes.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

From: Hanson, Robert
Sent: Wednesday, May 18, 2005 3:41 PM
To: Kreitman, Mark J.; Aguirre, Gary J.; Ribelin, Eric
Subject: Pequot

Like to meet and brainstorm about GE/Heller. Does 4:30 work in Mark's office?

From: Aguirre, Gary J.
Sent: Friday, May 20, 2005 10:02 AM
To: Kreitman, Mark J.
Subject: RE: Pequot immediate goal

Thanks.

Gary

From: Kreitman, Mark J.
Sent: Friday, May 20, 2005 9:55 AM
To: Aguirre, Gary J.
Cc: Berger, Paul; Hanson, Robert; Ribelin, Eric; Foster, Hilton; Eichner, Jim; Conroy, Thomas
Subject: RE: Pequot immediate goal

Sounds like Gary's strategy outsmarted (or terrified) Audrey and is resulting in real progress. Excellent!

From: Aguirre, Gary J.
Sent: Friday, May 20, 2005 9:49 AM
To: Kreitman, Mark J.; Hanson, Robert
Cc: Ribelin, Eric; Foster, Hilton; Eichner, Jim; Conroy, Thomas
Subject: Pequot immediate goal

I will be working out details on subpoena production with Audrey today and Monday.

The bottom line:

1) March 22 subpoena. E-mails for 27 Pequot employees immediately, remaining 7 within two weeks. Not produced: 200,000 being held for privilege review. I will get criteria used by FF for attorney-client term search on Monday, including names of attorneys on list. I expect to cut this down to something realistic during Tuesday phone call. Have some issues to work out with our IT staff.

2) February 7 subpoena. Three types of e-mails sought: issue related, trader related, and compliance related. Trader related produced during week of May 6. Issuer related and compliance related was the toughest nut. Relevant e-mails will go up on Iconnect as we designate: 60 employee years of e-mails per month until subpoena satisfied or we call it off. We can do this weekly as case development dictates. Again, the tricky part is privilege material which I am dealing with on Monday and Tuesday.

Gary

From: Hanson, Robert
Sent: Tuesday, May 24, 2005 11:06 AM
T : Aguirre, Gary J.
Subject: RE: Draft of letter re PCM e-mail production

See attached on our policy for inadvertent production.

[redacted]

From: Aguirre, Gary J.
Sent: Tuesday, May 24, 2005 9:21 AM
To: Hanson, Robert; Foster, Hilton; Ribelin, Eric; Eichner, Jim; ORourke, Kevin; Ivarone, Jason
Cc: Kreitman, Mark J.
Subject: Draft of letter re PCM e-mail production

I am attaching the final draft of my letter to Fried Frank dealing with e-mail production, with the exception of a provision dealing with the compliance officer's e-mails, an issue that I will try to pin down this morning.

Apparently, as suspected, FF has produced very few (500 at most) of the 50,000 e-mails to or from the PCM's compliance officer called for in different ways by our 11/24 letter, three subpoenas and numerous letters. Audrey is digging in her heels on this point. I suspect these e-some of these mails relate to books and records violations as well as internal PQ investigations dealing with insider trading. However, these are not our first priority. I'll send a long an update on this issue after I speak with Audrey this morning.

In general, I think this is a big step forward, but there's another one coming up. I see Fried Frank's strategy as giving up the outer Castle wall and retreating to the inner one (claims that over 200,000 e-mails, including the 50,000 mentioned above, must be reviewed for privilege).

Bob: I need to get the guidelines again relating to the return of inadvertently produced privileged communications.

Jason: I have a question for you in the draft and I would also like to work with you today, if you have a little time, on the letter that deals with security.

Eric: I left your marked up draft at the office, so I will incorporate your edits when I get in this morning

Jim: This document will impact all aspects of this investigation and would appreciate your comments although I understand it's pretty new.

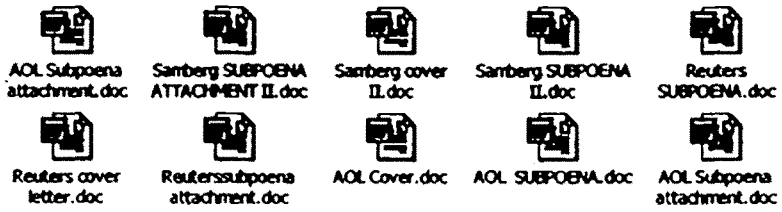
Hilton: any thoughts?

Gary

From: Aguirre, Gary J.
Sent: Tuesday, May 24, 2005 1:37 PM
To: Hanson, Robert
Subject: Subpoenas awaiting your approval

These are subpoenas that I forwarded Monday that still have not gone out.

Gary



From: Hanson, Robert
Sent: Wednesday, May 25, 2005 8:30 AM
To: Aguirre, Gary J.
Subject: RE: Subpoenas on Bloomberg, AOL and Reuters

[redacted]

From: Aguirre, Gary J.
Sent: Wednesday, May 25, 2005 7:14 AM
To: Hanson, Robert
Subject: Subpoenas on Bloomberg, AOL and Reuters

Can I see the documents that raise the privacy concerns? I would like to resolve this issue, since there could be something in the Bloomberg IMs for the critical Heller time frame.

Please keep in mind that we have an e-mail in which Samberg says he only communicates with a certain group of people by some form of IM. Samberg's IMs were subpoenaed by both our 2/7 and 3/22, but we got none. I have talked to his attorney and Audrey about what IM system Samberg used and both say they don't know. I think it was probably Bloomberg. On a related note, last night Audrey told me she would not be able to deliver the letter she had agreed to provide describing the number of e-mails FF is withholding. When I asked her what had changed since she agreed to provide the letter last Thursday in the meeting with Judge Sporkin, she told me that FF has decided more IMs are due under our subpoenas and thus there will be more privileged docs. I suspect Bloomberg's counsel called them; he told me I should get the IMs from Pequot rather than Bloomberg, so he's probably telling them the same.

From: Aguirre, Gary J. <[redacted]>
To: Ribelin, Eric <[redacted]>; Foster, Hilton <[redacted]>; Eichner, Jim <[redacted]>; Conroy, Thomas <[redacted]>; Glascoe, Stephen <[redacted]>; Miller, Nancy B. <[redacted]>
CC: Hanson, Robert <[redacted]>; Kreitman, Mark J. <[redacted]>
Sent: Fri Jun 03 08:36:07 2005
Subject: Possible tipper new Pequot Chairman?

John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. Mack moved from Morgan Stanley, adviser in Heller acquisition, to CSFB, also adviser in Heller, in late July 2001, the month of acquisition. The are hundreds of Pequot e-mails referring to Mack, including a dozen in July 2001. See e-mail below between Samberg and his son referring to Mack ("It's nice to have friends in high places...:)" Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets? Please note the happy face which has already come up twice in relating to possible flow of insider info. Ironically, Mack's article quoted below is C-1 of WSJ, just as was when Samberg's exchanged e-mails below.

John Mack to Join
Pequot Hedge Fund
In Chairman's Role

By GREGORY ZUCKERMAN and ANN DAVIS
Staff Reporters of THE WALL STREET JOURNAL June 3, 2005

In the latest example of a prominent financial figure entering the hedge-fund world, former Wall Street heavy-hitter John Mack is joining Pequot Capital Management Inc. as chairman.

Mr. Mack, 60 years old, was co-chief executive of Credit Suisse Group and CEO of that bank's Credit Suisse First Boston until last year, and previously

was president of Wall Street firm Morgan Stanley. He will work with Pequot's founder, Art Samberg, to help lead the firm into new markets, recruit money managers and help guide the Westport, Conn., firm. Hedge funds are lightly regulated investing pools, traditionally for the wealthy and institutions.

[John Mack]Mr. Samberg, 64, an investor with a well-regarded record, will remain chief executive of Pequot, which manages about $6.5 billion, effectively running the firm day-to-day. (Meanwhile, a British financial regulator, Gay Huey Evans, is joining a hedge fund run by Citigroup.)

Speculation about where Mr. Mack would land after he was replaced last year at CSFB has been something of a parlor game on Wall Street. Various companies put out feelers, including Goldman Sachs Group Inc., and he was approached as a possible candidate to run mortgage giant Fannie Mae, among other positions, according to people close to the matter. Some expected Mr. Mack, who is active in politics, to seek an office or ambassadorship.

But like many Wall Street traders and analysts lately, Mr. Mack is heading for the hedge-fund world, where assets are growing and the rewards can be lucrative. Hedge funds generally charge a management fee and a percentage of the firm's investment gains, meaning that stellar results bring big paydays. In addition to a salary, Mr. Mack will receive equity in Pequot, according to the firm.

Mr. Mack wouldn't address details of other possible job offers but said in an interview that he was attracted to Pequot because he and Mr. Samberg have been friends for more than a decade, starting when Mr. Mack gave some money to Mr. Samberg to invest. Mr. Mack also said he was eager to help the firm push into new investment areas.

[Arthur Samberg]"Many people who have called me for a job want me to fix something, but I'd like to focus my job on building," Mr. Mack said.

For Pequot, the hiring of Mr. Mack is part of a change in recent years from traditional hedge-fund strategies, such as buying and selling U.S. and European shares. Returns for some hedge-funds have fallen, amid concern by some that too many savvy hedge funds were seeking the same opportunities in the market.

Hedge funds lost less than 1% this year through April -- results that topped the returns of the market though they pale in comparison to the double-digit gains

hedge funds scored in recent years. Pequot's various hedge funds are up about 3% in 2005, according to investors. But Mr. Samberg predicts that the growth of the hedge-fund business will lead to a shakeout that forces as many as 30% of existing hedge funds to throw in the towel, even as institutions continue to up their investments in so-called alternative investments. At the same time, the market is neither cheap nor especially expensive, presenting few obvious opportunities. That is why Pequot has been looking elsewhere lately, starting hedge funds focused on emerging markets, parts of the debt world and other strategies.

As reported in The Wall Street Journal, Pequot recently formed a joint venture with Singapore-based Pangaea Capital Management to invest in distressed assets in Asia, including real estate.

Mr. Mack's move effectively blunts speculation that he might join a new investment-banking boutique with some recently departed top Morgan Stanley executives. A group of former Morgan alumni waged a loud campaign for the ouster of Morgan CEO Philip Purcell this spring, after a management shakeup and several executive departures. Mr. Mack, who clashed with Mr. Purcell before he left the firm in 2001, has kept a studied distance from the dissidents.

Mr. Mack's move effectively blunts speculation that he might join a new investment-banking boutique with some recently departed top Morgan Stanley executives. A group of former Morgan alumni waged a loud campaign for the ouster of Morgan CEO Philip Purcell this spring, after a management shakeup and several executive departures. Mr. Mack, who clashed with Mr. Purcell before he left the firm in 2001, has kept a studied distance from the dissidents.

Mr. Mack will be asked to tap into his wide-ranging contacts to find new investment ideas around the globe, as well as coach Pequot's investment team. Mr. Mack is expected to help smooth the way for Pequot fund managers by introducing them to company executives.

"I see an opportunity to build something really great here and John will be a big part of that," Mr. Samberg said.

Mr. Samberg's previous alliance with a high-powered partner ended when Pequot co-founder Dan Benton quit the firm in 2001, taking about $7 billion of investor money with him to his new firm, Andor Capital Management LLC. Mr. Samberg says he is confident his new partnership with Mr. Mack will work, in part because of his close relationship with Mr. Mack. In recent months, Mr.

Mack has been using spare space in Pequot's New York office, weighing his options.

The move to bring in an established Wall Street executive like Mr. Mack could signal that Pequot, like some other hedge-fund firms lately, might be interested at some point in selling itself, or part of the firm, to a mainstream Wall Street firm or even going public through a stock offering, although Mr. Samberg says he has no plans to do so. J.P. Morgan Chase & Co. recently purchased a majority stake in big hedge-fund firm New York-based Highbridge Capital Management., and Lehman Brothers Holdings Inc. has purchased 20% of Ospraie Management LP, a New York hedge fund.

Merrill Lynch & Co. agreed to provide $300 million in capital for a venture with Pequot to place money with 15 to 30 new fund managers. Pequot is expected to offer the managers research and administrative support -- part of a trend of hedge funds providing services also offered by investment banks., blurring the lines between the two.

BEGDOC =

PCM-07-077075

ENDDOC =

PCM-07-077075

BEGATTACH =

ENDATTACH =

FIRSTBATES =

LASTBATES =

ATTACHMENTS :

SOURCE :

DESCRIPTION :

TO :

[redacted]

FROM :

Samberg,
Art[/O=DSCM/OU=SOUTHPORT/CN=RECIPIENTS/CN=ART]

CC :

BCC :

MENTIONED :

SUBJECT :

Re: John Mack

DATE =

07/12/2001

DOCTYPE :

DOC_COND :

CUSTODIAN :

SambergA_0801

EXHIBIT_NUM :

OCRTEXT :

Spoke to him last night and commented on how up he sounded. He said he was close to somethbing, but I didn't know it would be today. Sounds like the perfect opportunity for him.

-—Original Message-----
From: Joe Samberg <[redacted]>
To: [redacted]
CC: 'art[redacted]<[redacted]>
Sent: Thu Jul 12 13:00:59 2001
Subject: John Mack

If you read the front page of the C Section of the WSJ, you will see that our friend and latest investor, John Mack, is to become the new CEO of CFSB, the no.2 underwriter in the U.S.! It's nice to have friends in high places...:)

Joseph D. Samberg
President, JDS Capital Management, Inc.
780 Third Ave.

New York, N.Y. 10017

tel:[redacted]
fax:[redacted]

IMAGE_NOTES :

PRIMARYFILE :

\\DCTSFS07\ScancodeD\EFP\FRIED\PEQUOT\156170\DATA\Group 1\SambergA_0801\Personal_Folders\Sent_Items\001477\!!!message.msg

PRIORITY :

Normal

SENSITIVITY :

Normal

GROUPID =

Sam-004002097

DOCID =

Sam-004002097_0001

ISPARENT =

YES

Gary J. Aguirre

Senior Counsel

Division of Enforcement

Securities and Exchange Commission

Phone: [redacted]

Fax: [redacted]

mailto: [redacted]

From: Kreitman, Mark J.
Sent: Monday, June 06, 2005 6:32 PM
T : Aguirre, Gary J.; Hanson, Robert
Subject: RE: Pequot: Missing tapes update and quesion

Let's discuss now, if you're both free.

From: Aguirre, Gary J.
Sent: Thursday, June 02, 2005 3:01 PM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: FW: Pequot: Missing tapes update and quesion

Neglected to cc you on this.

From: Aguirre, Gary J.
Sent: Thursday, June 02, 2005 2:54 PM
To: Kreitman, Mark J.
Subject: Pequot: Missing tapes update and quesion

Mark:

Bob suggested I pass this one by you.

I questioned Pequot's IT chief about missing tapes during his testimony on 5/4. A few days later, Audrey called and said she spoke with Andor, formed by Samberg's protégé Benton in 2001, when Benton broke away from Pequot in 2001. Audrey told me Andor's staff had taken no Pequot tapes when they left Pequot in 9/2001. This did not smell right. A few days later, I subpoenaed Pequot e-mails and backup tapes from Andor. Jim Benjamin (Akin Gump) respresents Andor and has been very cooperative. He tells me Andor has 21 Pequot tapes, including two for June and July 2001, the key period for Heller-GE.

I believe we have the following options:

1) Tell Andor to produce backup tapes per subpoena, retrieve e-mails and possibly surprise Samberg with e-mails he hasn't seen; [redacted]: Audrey screams about attorney-client, claiming Andor was split off; could also be expensive to do retrieval/forensics on tapes.
2) Audrey has offered to have Pequot pay for national forensic/e-mail retrieval firm to recover e-mails, FF reviews them, and Audrey produces to us; [redacted]: snail slow production; specious assertion of privilege;
3) My suggestion: try to get Audrey to offer # 2 above, with waiver of privilege if we agree not to go via #1. [redacted] we don't surprise Samberg.

Your call?

Wildcard: Has Pequot waived attorney client privilege by giving backup tapes to Andor, a third party? My take: presumptively yes.

Gary

From: Aguirre, Gary J.
Sent: Sunday, June 12, 2005 4:34 AM
T : Hanson, Robert
Subject: RE: Wash trades: where's the fraud?

Yes. They are all identified on the blotters.

From: Hanson, Robert
Sent: Friday, June 10, 2005 11:14 AM
To: Aguirre, Gary J.
Subject: RE: Wash trades: where's the fraud?

Sounds like we're getting close. Do we know who had the trading responsibility?

From: Aguirre, Gary J.
Sent: Friday, June 10, 2005 10:55 AM
To: Hanson, Robert
Subject: RE: Wash trades: where's the fraud?

Yes, is seems to be a clear violation. But there are two caveats.

First. Scienter may be proved in two ways: recklessness and intent. Under the standard jury instruction, a person is presumed to intend the natural consequences of their acts. By telling the broker the trade was a cross trade, Pequot is presumed to intend that the trade will appear to be active trading, when in fact it is not. However, the presumption may be rebutted. That takes us to this question: what type of evidence could be offered by Pequot to show that it did no intent by its "cross trades" to mislead the market into believing that there was active trading? That will not be easy for Pequot to do, but we should button this down. I have some thoughts in this regard and began to get in to this in Round I of Samberg's exam.

Second, the theory needs some sex appeal for a jury. One way is to show that Pequot got some kind of payoff for this, e.g., got a slice of the IPO. Second, show that these trades in fact had a significant impact on the market. Tom has been working on this angle.

From: Hanson, Robert
Sent: Friday, June 10, 2005 10:25 AM
To: Aguirre, Gary J.
Subject: RE: Wash trades: where's the fraud?

Do you think we have enough to sue them now?

From: Aguirre, Gary J.
Sent: Friday, June 10, 2005 10:02 AM
To: Hanson, Robert
Subject: RE: Wash trades: where's the fraud?

How do you not have scienter when you tell your B-D that a trade is a cross trade (between two different customers) when in fact it is a wash trade (same customer)?

From: Hanson, Robert
Sent: Friday, June 10, 2005 8:38 AM
To: Aguirre, Gary J.
Subject: RE: Wash trades: where's the fraud?

It's all about the scienter.

From: Aguirre, Gary J.
Sent: Thursday, June 09, 2005 12:40 PM
To: Hanson, Robert
Cc: Ribelin, Eric; Conroy, Thomas; Eichner, Jim
Subject: Wash trades: where's the fraud?

Bob:

Marlon Paz of Market Reg. agreed with the analysis below.

Here's the fraud. The language of Section 9(a)(1) of the 1934 Act (see below) requires the trading to "create a misleading appearance." Pequot tells the broker it is doing a cross trade, which is defined two mean a trade between two different customers of a B-D. B-D records the cross-trade for 100,000 shares. The public sees this as a legitimate trade of 100,000 shares $2 above the IPO price. Acting on this appearance, the public buys at the elevated price.

The truth: the wash trade masquerading as a cross-trade has misled the public twice. First, the public was tricked into thinking there was active trading, when there was none. Second, the public was tricked into thinking the volume was occurring $2 above the IPO, when there was none.

Gary

Section 9(a)(1) of 1934 Act Transactions relating to purchase or sale of security

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange--

1. For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size,

at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

From: Hanson, Robert
Sent: Friday, June 10, 2005 12:59 PM
To: Aguirre, Gary J.
Subject: RE: Pequot e-mails 3.33 million avaibale for review at On Site website on Monday

I would like one

-----Original Message----
From: Aguirre, Gary J.
Sent: Friday, June 10, 2005 12:58 PM
To: Ribelin, Eric; Foster, Hilton; Conroy, Thomas; Glascoe, Stephen; Eichner, Jim; Miller, Nancy B.
Cc: Kreitman, Mark J.; Hanson, Robert; ORourke, Kevin
Subject: Pequot e-mails 3.33 million avaibale for review at On Site website on Monday

I received notice yesterday (see below) the database of 3.33 million e-mails has now been set up at On Site E-Discovery. This includes all e-mails of Pequot employees identified in our February 7. It also includes all e-mails called for by our March 22 subpoena except for those withheld for further privilege review. It does not include e-mails that may be found in backup tapes that were recently discovered. The e-mails are being sorted into folders (one per PCM employee) and database will be available on Monday for our use.

I will allocate passwords on Monday. Please advise me if you would like a password by the end of the day.

-----Original Message-----
From: [redacted]
Sent: Thursday, June 09, 2005 6:35 PM
To: [redacted]
Cc: [redacted]
Subject: SEC FF PRODUCTION

The following database is ready for searching:
[redacted]

Case: SEC - FF Production
Database: SEC Email Production

Username Iconect Password

If you have any questions, please do not hesitate to call the following individuals:

Debra Rozier
Bryan Pietrzyk
Abeselom Tessema (Abie)

****

NOTICE: This e-mail message and all attachments transmitted with it are intended solely for the use of the addressee and may contain legally privileged and confidential information. If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution, copying, or other use of this message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately by replying to this message and please delete it from your computer.

****

From: Aguirre, Gary J.
Sent: Sunday, June 12, 2005 9:46 AM
To: Hanson, Robert
Subject: FW: Re HO-9818
Importance: High

Bob:

As you know, Fried Frank has withheld 200,000 e-mails responsive to our March 22 subpoena. To select these e-mails, Fried Frank conducted a search of the universe of e-mails using the names of attorneys who had represented either Pequot *or its employees*. Fried Frank circulated a letter among Pequot employees requesting the names of attorneys who had represented the employees in the past.

My take was that Audrey used the names of employees' putative attorneys as search terms in order to bloat the number of e-mails that would have to be reviewed and thus delay the review process. Additionally, we have no way of confirming whether any of the names provided by Pequot employees actually represented them. After researching the issue, I took the position during the meeting with Audrey and Judge Sporkin on May 19 that Fried Frank had no standing to assert the privilege of its employees (third parties), and, in any case, the privilege was waived by the employees in using Pequot's e-mail system. Audrey claimed that some employee e-mails were privileged and highly sensitive. As to those, I agreed that the employees could have their attorneys contact me directly to discuss the privilege.

Of the 400+ past and present Pequot employees, only three have asked that we do not compel the production of their e-mails. They are: Steven Cutler (represented by Robert Anello), Faraz Naqvi (represented by Judge Sporkin), and Mark Broach (represented by Robert Jossen).

Naqvi's request along with his privileged log is attached. I intend to write Judge Sporkin that the privilege has likely been waived by Naqvi using Pequot's e-mail system, but we will not require production of the e-mails at this time. I will take the same position with cutler and Broach if their privilege log also shows the e-mails are very personal and have no connection to our investigation. However, we have not taken any position so far, other than to require the individual employees to assert the privilege. Your thoughts?

I was supposed to notify Audrey of our position regarding the privilege assertion of these three employees on Friday. With the exception of these three, assuming that you agree, the e-mails of all other employees to or from persons identified as attorneys will be released for posting on the SEC database at On Site early next week.

Gary

-----Original Message-----
From: [redacted] [mailto:[redacted]
Sent: Friday, June 10, 2005 2:36 PM

To: [redacted]
Cc: [redacted]
Subject: Re HO-9818
Importance: High

FOIA CONFIDENTIAL TREATMENT REQUESTED FOR E-MAIL AND ATTACHED
CORRESPONDENCE

Mr. Aguirre:

Please see the attached correspondence following up on my voice-mail message to you regarding certain documents related to Dr. Faraz Naqvi that we believe are privileged and exempted from electronic production. I look forward to hearing back from you.

Thank you very much.

Peter

(See attached file: lettertoAguirre.pdf)

Peter M. Friedman
Weil, Gotshal & Manges LLP
1501 K Street, NW Suite 100
Washington, DC 20005
Tel: [redacted]
Fax: [redacted]

< END >

< END >

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From: Hanson, Robert
Sent: Monday, June 20, 2005 8:25 PM
To: Aguirre, Gary J.
Subject: Re: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Okay Gary you've given me the bug. I'm starting to think about the case during my non work hours.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. <[redacted]>
To: Hanson, Robert <[redacted]>
Sent: Mon Jun 20 13:45:43 2005
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments below.

From: Hanson, Robert
Sent: Monday, June 20, 2005 12:48 PM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Couple more: Mack spoke with Heller? Don't have evidence of this. See 2 below and then 1) below that, if he's taking with Heller doesn't that go a long way to implicating him? Agreed but no evidence. I still don't get 4) below. When was Mack investing in the funds and how much. Don't have any records showing amount of all investments, just the funds he invested in. But here's what we know from e-mails: Mack was an original investor in Pequot (1999) and invested in multiple funds and deals between May and August of 2001, the only time fame I have reviewed carefully. One investment was $5 million. Another was $1 million. I think another was for $5 million. There are references to others where amounts not stated. Also, where was Mack before

CSFB? From March through start date with CSFB, Mack between jobs but sometimes used Samberg's office in New York. Mack was with Morgan Stanley until March of 2001. Recent subpoena to MS asked for 1) all Mack (plus assistants') e-mails to PQ before he left in March and 2) all e-mail from MS staff to Mack after he left. Maybe that's where he learned about Heller. True.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 12:36 PM
To: Hanson, Robert
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments answers below

From: Hanson, Robert
Sent: Monday, June 20, 2005 11:16 AM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-thoeory.

Interesting stuff!

Couple questions:

1) Are you suggesting that we take Mack's testimony now before we get the documents or that we ask for more documents from CSFB or both? Both If you want more documents from CSFB, what would they be? I need to draft language but I would want to get his contract (when signed? June?) and all documents that relate to his phase in (assuming it occurred in June), particularly any meetings with investment banking staff or any download he got from Wheatly, the CEO that was forced out. Keep in mind that he had confrontations with bankers when he walked in, including Quattrone.

2) How do we know that Mack spoke with Heller on June 29 (1 below)? Samberg e-mail of 6/30 saying he spoke with Mack the night before.

3) When did Samberg start buying Heller (3 below)? July 2, the Monday after Mack call.

4) On 5 below, was Mack personally investing in Pequot? Yes; he was an original investor. If so, when and how much? Don't know total, but e-mails in May-August refer to $5 million in one fund, plus more $ for Scout. How would he invest in the hottest deals? Directly, but hard to tell much more because e-mails cryptic and in code. He was investing in: "fresh start," "Baby C," and "distressed guys." Fresh start was some kind of spin-off from Lucent. And the hottest funds? During time frame, he put $5 million in one fund and wanted to put more in Scout (suspect he was did) which was on fire.

5) Do you interpret the e-mail quoted in 5 below to mean the minimum investment of $5 million to be waived for important industry contacts? Not sure. Samberg says more than $10,000,000 Did Mack then invest less than $5 million in partners? E-mail was not about Mack; it was communication to Zilkha that shows Samberg's state of mind on July 2, 2001.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 10:18 AM
To: Hanson, Robert
Subject: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

I think we should serve a second subpoena on CSFB seeking all documents regarding Mack's phase in with CSFB. Our

first subpoena was very narrow, seeking only e-mails to or from Mack and Pequot during June and July 01. A tougher question is whether to take Mack' story now or wait till we get all info from CSFB. I favor doing it now.

As a theory, the CSFB-Mack-Samberg best connects the dots for the path of the GE-HF tip. It has some gaps and uncertainties, but no inherent inconsistencies. If Mack learned from CSFB about Heller around June 29, I think the story would

be compelling. Here are the dots I see:

1) Samberg's aggressive buying of Heller suggests he received the tip shortly before July 2. Mack spoke with Heller on Friday evening June 29.

2) June 29 is also a logical time for Mack to learn about the CSFB's inventory of investment banking deals, including the Heller acquisition, given Mack's July 12 start date with CSFB. My inference, albeit on sketchy evidence, is that Mack committed to CSFB in early June;

3) Samberg's continued buying suggests that he was continuing to receive confirmation the acquisition would go through. Mack would likely have continued to get updates on GE-Heller and he continued to have contacts with Samberg.

4) With over $400 million in Pequot funds, an MIT graduate, and 16 years running hedge funds, Samberg was too rich, too smart and too experienced to take a tip from anyone he would not deeply trust. Mack met this criterion and had as much to lose and Samberg if they got caught.

5) Mack profited from being allowed to get in closed funds and in special Pequot deals. He was allowed to pour millions into Pequot's hottest deals and hottest funds in May through August 2001 when Pequot was managing over $15 billion in assets and funds were not accepting new money. As Samberg put it on July 2, the day he began trading in Heller, "the only fund open now is partners, and although the min is $5mm, we are always willing to make significant exceptions for important industry contacts."

[Bob: The term "industry contacts" appears more than 2000 times in PQ e-mails]

Incidentally, the above may also help explain Lynch's call to Paul. Incidentally, Lynch advised Mack on at least one Pequot deal. Mack wrote Samberg on 2/6/02 stating, "I have checked with Gary Lynch and he confirmed that there is no conflict for me as an original investor [in Pequot]." Mack also hired Lynch: Here's one newspaper account: "Mack hires include Gary Lynch, a former enforcement chief at the Securities and Exchange Commission, who is a vice chairman in charge of stock research and legal compliance, and Stephen Volk, 68, a former managing partner at law firm Shearman & Sterling, who was Mack's first hire and became chairman of CSFB."

Incidentally, Volk resigned from Shearman & Sterling in early June, suggesting that the Mack-CSFB deal was in place by then, which in turn means June 29 is a possibility when Mack learned about GE-Heller.

Gary

From: Aguirre, Gary J.
Sent: Monday, June 27, 2005 7:42 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Ribelin, Eric
Subject: Samberg's trading in HF and GE:

This memo summarizes the evidence, *especially Samberg's own testimony*, suggesting that he acted on confidential information in making his trading decisions on GE and HF. This memo supplements but does not repeat the information contained in the Excel spreadsheet that chronicles the events leading up to the public announcement of the GE-HF acquisition.

A) Samberg's wanted to buy more HF and short more GE

On July 30, 2001, General Electric announced its acquisition of Heller Financial ("HF") at approximately a 50 per cent premium to its last trading price. From July 2 through July 27, 2001, Samberg purchased 1,148,200 shares of Heller for a purchase price of $43,839,784.43. His profit on HF, according to PCM records, was $16,939, 578.52.

Samberg wanted to buy significantly larger blocks of HF during July 2001, particularly during the week before the public announcement. On July 2, the first day he directed in PCM, he directed the purchase 223,700 shares; only 100,000 shares were filled. The total trading volume on that day was 388,900 shares. On July 10, 2001, Samberg directed his PCM trader to purchase 455,300 shares; only 100,000 shares were filled; trading volume was 375,600 shares. On July 11, Samberg's order was for 336,500 shares; only 56,500 shares were filled; volume that day was 158,200 shares. During the week of July 23, 2001, the week before the public announcement, Samberg directed his traders to purchase 480,400 on Monday, 418,500 on Tuesday, 373,000 shares on Wednesday, 302,900 shares on Thursday, and 243,900 on Friday. His trader purchased only 10,000 on Monday, 18,500 on Tuesday, 10,000 on Wednesday, 20,000 on Thursday, and 10,000 shares on Friday. On July 30, 2001, the day of the announcement, Samberg had a standing order to purchase 233,500 shares. Later that day, after the announcement, he sold his entire holdings of 1,148,200 shares.

Likewise, Samberg engaged in heavy short sales of GE beginning on July 25, five days before the public announcement of the acquisition. On July 25, he directed his trader to short sell 766,600 shares of GE. It was fully executed. On July 26, he directed his trader to short sell an addition 385, 200 shares of GE; only 50,000 were executed. On July 27, Samberg instructed his trader to short sell an additional 385,500 shares of GE; only 20,000 were executed.

The point is this: Samberg risked $80,000,000 of PCM assets belonging to sophisticated institutional investors. He wanted to risk much more. This suggests that he had extraordinary confidence in PCM's research in GE and HF or that for some other reason he believed HF's price would go up and GE's would fall. This memo next takes a look at PCM's research on both sides Samberg's GE-HF bet.

B) Samberg's explanation why he bought Heller Financial (HF) is not credible.

1) Samberg regurgitated information during his testimony why he purchased HF that was spoon fed him by his attorneys.
   a) Samberg identifies six reasons he purchased HF's stock: (1) credit climate that existed in 2001 was favorable for HF; (2) HF's strong financial model; (3) speculation that HF would be involved in a consolidation; (4) analysts' reports described the attractiveness of the HF franchise; (5) the relative performance of HF vs. other financial stocks; and (6) analysts' reports that HF was growing at ten percent and was projected to continue that growth (RT II, p. 67, l. 2 – p. 69, l. 22).
   b) Each data point was described in the materials shown to Samberg by his counsel shortly before he testified (RT II, p. 75, ll. 25 – p. 80, l. 19).[1]
   c) Five of the six items above were contained in Legg Mason report that Samberg did not see *until months after he purchased HF.*
   d) Samberg claims he saw an analysts report in July 2001 like the one his attorneys showed him. PCM has produced no such report. No is there a hint of one in the PCM production. Here's Samberg's testimony on the report shown to him by his attorneys:

      Q Have you seen this report in any e-mail dated before July 30, 2001?
      A I don't recall seeing it.
      Q Do you have a high regard for sell side analysts?
      A I have a high regard for them as people. I don't have a high regard for using their reports to make investment decisions.
      Q It would have been very unusual for you to rely on a sell side report, would it not, in making an investment decision?
      A Historically, that is true.
      Q In fact, isn't it true, sir, that you don't think they're worth a damn?
      A In general, I don't think their reports are worth a damn. The people can be, but not the reports.
      Q Right. And you've made that statement publicly, have you not?
      A I have.
      Q So this is -- Exhibit 19A is sell side research, is it not, sir?
      A Sure is.
      Q Exactly what you said isn't worth a damn. Correct?
      A You bet.
      Q So is it fair to say that the research you saw in July 2001 about Heller Financial also wasn't worth a damn?
      A I really don't know what I saw.

2) Samberg consulted with no one, contrary to PCM practices, before and during his trading in HF.
   a) Samberg did not communicate with anyone at PCM before buying HF. (RT I, p. 70-71).
   b) No one assisted Samberg in making the HF trading decisions in July 2001.Samberg made a decision not to seek the help of any of the 250

[1] When it was established that Samberg was spoon-fed information by his attorneys as reasons he purchased HF, he attempted to create fussy new reasons for his trading decisions (RT II, p. 81, ll. 2-25).

people who worked at PCM in connection with his decision to buy HF (RT I p.112, ll. 16-23).

c) Samberg can recall no discussions with anyone at PCM regarding his decision to purchase HF (RT I, p. 71, p. 81, l. 9-15).

d) Samberg has no recollection of speaking with anyone employed with HF before making the decision to purchase HF (RT I, p. 71).

e) Samberg can recall no discussions with any financial services firms or brokerage firms or consultants before making his decision to invest in HF (RT I, p. 81, l. 22 – p. 83, l. 4).

f) Samberg does not recall speaking to any analyst about HF when he was purchasing the stock (RT II, p. 55, l. 23 p. 56, l. 6).

g) Samberg does not recall speaking with anyone about HF before or during the period the period he purchased it (RT II, p. 56, l. 14-17).

h) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. [See PCM "due diligence" section below.]

3) No PCM documents were generated when Samberg purchased HF except trade blotter.

a) Samberg maintained no hard copy or electronic files relating to his decision to buy HF (RT I p. 69 ll. 11-14).

b) No one prepared any files regarding Samberg's decision to trade in HF (RT I, p. 79, l. 24 – p. 80, l. 4).

c) Samberg could not identify any analyst report that he claims to have read before his decision to buy HF in July 2001 (RT I p. 70, ll.18-22) [Hard to understand why Samberg would consider any analyst report because, according to him, "analysts' reports aren't worth a dam."

d) Samberg also testified at the second session that he does not recall seeing any analyst report before or during the time he was purchasing HF's stock (RT II, p. 56, l. 7-13).

e) PCM produced only two documents relating to Samberg's decision to purchase HF stock. One is an e-mail dated July 11, 2001, from Samberg to his chief trader which states "where are we on HF?" The second is also an e-mail sent from Samberg after the July 30 announcement of the acquisition. It contains only the following symbols: :) :) :) :) :) :) Samberg can recall no other e-mails (RT I p. 108 ll. 23-25).

f) Samberg has no recollection of seeing any newspaper articles about HF before buying the stock (RT I, p. 72).

g) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. [Also, see PCM "due diligence" section below.]

4) Samberg did no home work on HF before purchasing $44 million of its stock.

a) Samberg did not closely follow HF "in the way people follow stocks before it was purchased" (RT I, p. 72).

b) Samberg had "no recollection specifically of how I started the Heller investment other than to know that I had been doing this for many years and recognized these opportunities when they come up" (RT I, p. 74).
c) Samberg's decision to purchase HF in July 2001 had "nothing to do with Heller (RT I, p. 74-75)." Rather, "it was everything to do with the charge I had, which was to manage an important piece of money for clients" (RT I, p. 75).
d) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. Also, see PCM "due diligence" section below.

5) HF was not in an industry that Pequot covered in 2001.
a) PCM and its Core Group, which Samberg managed, focused on technology, media, telecom and healthcare in July 2001(RT I, p. 59-60).
b) HF was in the "financial services industry" (RT I, p. 75-76).
c) Samberg could not recall purchasing securities in this industry before July 2001 (RT I, p. 76, ll. 12-18).
d) PCM had no one who specialized in financial stocks when Samberg bought HF (RT I, p. 75-76).

C) Samberg could offer no explanation why he began a $36 million short of GE stock five days before the public announcement GE was buying HF.

Here's the transcript:

Q Now, two months later, almost two months later, there is a short by you, sir, on July 25, 2001 in the amount of 756,000 shares or just shy of $33 million.

Do you see that, sir? [I was showing Samberg GE trade blotter]
A I do.

Q Now, can you tell us the reasons that you felt that GE should be shorted at that particular time?

A No, I can't.

Q Do you recall whether you were relying on technical analysis or fundamental analysis?

A I can't remember anything about the trade.

Q Now, I notice that that was the largest trade made in GE except for the sale -- or, excuse me, the -- well, that was the largest trade in GE up until that point in time.

A There was a larger one in August.

Q Right. That's when it was covered, sir. I said up until that point in time.

A Okay.

Q You have no understanding at this point why you made that trade?

A No.

Q Do you know why you made it just –

A Do you know how many trades I made that year?

Q Do you know why you made it five days before the public announcement on Heller Financial?

A No idea.

Q The next day, I notice the – excuse me, two days later, on July 27th, you shorted another 34,000 shares of GE. Correct, sir?

A That appears to be the case.

Q Do you know why you shorted it on that date?

A No.

Q Do you have any recollection whatsoever?

A None.

Q Have you attempted to ascertain from any records what caused you to trade --

A Well, first I have to realize that I did do it. So no, I made no ascertations.

Q Now, do you have any explanation why you had $80 million invested in GE and Heller Financial a few days before a public announcement of the --

A $80 million in what?

Q You had 44 million in Heller Financial. You had 36 million in GE.

A You're linking the two. I'm not willing to do that. That's -- I don't understand that at all.

Q Thank you. So they weren't linked in your mind?

A They were or were not?

Q They were not linked in your mind at that time?

A No.

[Samberg's above testimony that his GE and HF trades were not related is inconsistent with his testimony (see below) that he bought because there was speculation of a merger. Since he is lying, it's hard for him to keep his story straight.]

D) Samberg's $80 million trades in HF and GE cannot be reconciled with his description of PCM's due diligence procedures in 2001 for making such trading decisions.

Samberg's testimony below follows his identification of a pamphlet delivered to PCM investors describing PCM's "due diligence" procedures in making trading and investment decisions. Samberg's decision to buy HF without consulting with any of PCM's 250 employees, without speaking at HF, without following HF, and without researching HF cannot be reconciled with PCM's customary "due diligence" before making such decisions. Two points: he didn't need to do a "due diligence" because he had the info; he violated PCM's practices or he's lying about how he made the decision.

Q And in the first sentence, it says, "This due diligence package was created by Pequot Capital Management, Inc. for current and prospective investors and their immediate affiliates."

Is that correct, sir?

A Yes.

Q Now I'd like to ask you to turn over to page 8,

PCM-081626. And under Roman numeral V, "Investment Style and Strategy," I'd like you to focus on item 1. And I'm going to read it, the first sentence, and I'm going to ask you if it's a true statement.

"Describe the development of your investment approach and how investment ideas are generated." So this is -- the statement follows. "Pequot Capital's investment process begins with an intensive research of a company's underlying fundamentals."

Is that a correct statement, sir?

A Yes.

Q Was that correct in 2001?

A Yes.

Q "Investment ideas are generated as a result of meetings directly with company senior management teams."

Is that a correct statement?

A Uh-huh. Yes.

Q Is that correct in 2001?

A Yes.

Q "This allows the investment team to understand a company's management structure, thought process, strategic direction, and products."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes, it was.

Q "In-depth meetings and industry research provides the research to prospective fund's analysts with an overview of a particular industry as well as the individual company, and allows for comparisons to be made within that specific industry."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes.

Q "The investment staff visits thousands of companies each year, conducts extensive interviews with management as well as competitors, suppliers, distributors, and customers."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes.

Q "Based on research, the investment analyst is able to formulate business models and discuss their ideas with other members of the investment staff and the respective fund's portfolio manager prior to a position being included

12 within the portfolio."

13 Is that a correct statement, sir?

14 A Yes, it is.

15 Q Was it a correct statement in 2001?

16 A Yes, it was.

17 Q "The portfolio manager makes the ultimate decision

18 as to whether or not a position will be added to the

19 portfolio."

20 Is that a correct statement?

21 A Yes.

22 Q Was it a correct statement in 2001?

23 A Yes, it was.

24 Q "The investment approach is consistent across all

25 funds managed by Pequot Capital."

1 Is that a correct statement?

2 A Yes, it is.

1 Is that a correct statement?

2 A Yes, it is.

3 Q Was it a correct statement in 2001?

4 A Yes, it is.

E) What does Zilkha-MSFT tell us about Samberg? .

As you know, however, there is a missing link in GE/HF: If Samberg traded on material nonpublic information (MNI), where did it come from? There are no e-mails to or from Samberg referring to any contacts with GE, HF, or any of the investment bankers

involved in the acquisition. The Samberg-Zilkha e-mails show how Samberg operates. They again and again show Samberg using Zilkha to get MNI from Microsoft. One shows Samberg asking Zilkha "those [MSFT] contacts have any views on the direct tv – Murdoch –rumored msft possible deal?" This does not prove the GE-HF case, but does it suggest why Samberg's explanation makes no sense on HF and why he has none on GE? Beyond a reasonable doubt on GE-HF? Not yet. Meet the preponderance of the evidence burden? I'll get back to you after Samberg testifies on Zilkha. I have also asked Nancy to do an Excel spreadsheet on the Samberg-Zilkha-MSFT trades.

F) Was John Mack the tipster?

You have the Excel spreadsheet. I will get the revised, edited version to you by tomorrow. In summary, Mack likely had the GE-HF info sources, he had contacts with Samberg during the period, there was *quid pro quo*, mutual trust existed, and Samberg needed a huge favor. Samberg's need for a big favor is a new idea. His company was splitting a part. Benton was a younger and brighter light. Benton's performance was demonstrably superior to Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and ***I did things in a manner that was expedient at the time given my expertise in this area.***

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. ***Times were fragile.*** I needed their approval to do whatever I wanted to do ***or they might walk.*** So I wanted them to meet anybody that I was interested in talking to to building out the platform.

From: Aguirre, Gary J.
Sent: Tuesday, June 28, 2005 5:46 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Ribelin, Eric
Subject: GE-Heller: Obstacles and propsed next steps

This memo summarizes the proposed steps for advancing the investigation of the GE-HF investigation. I have other thoughts regarding how we might advance the investigation of other SRO referrals (e.g., Elite Information and Blue Coat Systems) as well as the efficient identification of other insider trading activity.

I assume you have reviewed memo 1 which summarizes Samberg's testimony on why he traded in HF and GE. His explanation of his HF trading lacks credibility and he has none on GE. Still, we need to establish the likely path through which the material nonpublic information (MNI) flowed to Samberg. Proposed below are five avenues for establishing that path.

A. Documents-Testimony from the five investment bankers (CSFB, Morgan Stanley, JP Morgan, Lehman and Merrill Lynch) or the two principals (GE and HF).

I discuss these possible tip sources in ascending order, given what we know now, of probability. .

The least likely sources *at this point* are Heller, Merrill Lynch, and Lehman. We have no evidence of any Samberg-HF contacts. Samberg denied having any contacts with HF. He could not identify any of the HF employees involved in the acquisition. Merrill was consulted by Fuji Bank very early, was not hired, and was not heard from again. Yesterday, Merrill produced documents pursuant to our subpoena on a CD which I will review when they have been posted to Iconnect. Hence, its status could change if something shows up. Samberg did testify that he might have spoken with someone from Merrill. Also, there were a huge amount of hard and soft dollar commissions that went to Merrill from July 1, 2001, through June 30, 2002 (approximately $16 million). The chronologies indicate that Lehman, which had investment banking ties with Heller, did not become involved until just before the announcement of the acquisition in late July 2001. I have not as yet served a subpoena on Lehman.

JP Morgan is up on notch as a source of a tip. It consulted with Fuji from beginning to end. However, Samberg testified he knew no one on the JP Morgan acquisition team. JP Morgan's counsel wrote that there were no e-mails between Morgan's and Pequot. Additionally, Samberg testified that he does not recall anyone having any contacts with anyone from JP Morgan in 2001. In short, we have no leads.

Up another notch as a tip source is GE. Samberg knows two members of the GE acquisition team, John Myers and Kenneth Langone. Langone was an outside director and there are few e-mails between him and Samberg in 2001. One e-mail suggests

that Langone and Samberg met in January 2001. Samberg testified he was not certain he knew Langone in 2001. However, his testimony regarding Langone was a little suspicious (RT II p. 28, l. 20-p. 31 l. 14). Samberg has a much stronger relationship with John Myers, CEO of GE Asset Management. It dates back to the late nineties. He attends basketball games with Myers. When I asked Samberg if he ever discussed GE business with Myers in these games he responded, "What do you mean by discuss 'GE businesses?'" However, GE's chronology indicates that both Myers and Langone did not learn about the HF acquisition until just before it was announced. However, there is no accuracy warranty with the chronos; Chrysakos—the GE VP that went to prison as a tipster on GE-HF—was not even mentioned in the GE chronology to the NYSE. I have asked GE, represented by Wilmer-Cutler, to submit a more complete chrono in view of the Chysakos omission.

The second highest probability of the tip would be Morgan Stanley (MS), which consulted with GE, for two reasons. First, MS is Pequot's prime broker. Samberg rattled off about ten names of higher echelon MS people he knew in 2001, though he denied knowing any of the individuals on the acquisition team that consulted with GE. More importantly, there is the Mack connection. The rub is that Mack left MS in March or April 2001, before MS knew about GE-HF. However, Mack came from the institutional side of MS and had been expected by the media to bring many of its bankers with him to CSFB, implying the depth of his relationships with MS bankers that might have known about GE-HF. It later became public that there was a contractual prohibition in Mack's severance agreement precluding him from hiring away MS staff. Yesterday, we received a packet of Samberg-MS e-mails from MS for the period before Mack left MS. The more interesting e-mails would be those after he left and after MS learned about GE, which have not as yet arrived. I doubt we will find anything like a tip, but we find him being chummy with somebody who knew about GE-HF.

The top spot goes to CSFB, which consulted with HF, for reasons you know. This could of course change if it turned out that Mack had no significant contacts at CSFB until after July 2. As you know, we have subpoenaed communications between Mack and Pequot from June 1, 2001, until June 2004, when he left CSFB. My view is that we should broaden the subpoena to obtain (1) all communications between Mack (we now have his e-mail address just before he started with CSFB) and CSFB for the two months before he began with CSFB and (2) all documents relating to his phase in as CEO at CSFB generated during June and July 2001. Further, I think we need to take Mack's testimony and simply nail down whether he will admit that he knew about the GE/HF acquisition from any source. Obviously, he could have learned this at either CSFB or MS. Since the GE-HF info could have been communicated to him in the regular course of business from CSFB, and thus third parties would be innocently involved, he might actually tell us if this occurred. If this was the tip path, the question would be when: the closer to June 29 or the morning of July 2, the stronger the case that he was the tipster. As discussed in my first memo, please keep in mind that Samberg was a heavy purchaser of HF on July 2 and tried to buy more than twice the amount he actually executed. I have asked Tom Conroy to get BOA

Montgomery's trading tickets for July 2 so we can determine whether the trade was put in at the opening or during the day. If it was put in during the day, the tip could have come on the morning of July 2. If by any chance that is when Mack learned of the acquisition, he would look very much like the tipster.

It is also important whether Mack had his GE/HF information refreshed during July 2001. On July 9, Samberg, for some reason, only tried to buy 15,000 shares of HF. The next day, he directed his trader to purchase 455,300 shares of HF. What did he learn between his July 9 order and his July 10 order? Did Mack have his information refreshed at this time?

In short, the broadened subpoena and Mack's testimony could (1) point to Mack as the tipster or (2) eliminate Mack as the tipster and thus suggest we eliminate CSFB and look closer at the other candidates.

B. Production of additional e-mails.

A second possible source of evidence indicating the tipster for GE/HF is the yet un-produced e-mails of Pequot. There are two possibilities. First, Pequot is holding aa now unknown number of e-mails and instant messages for privilege review. Fried Frank has represented that there are no e-mails to or from Samberg for the period of April 15, 2001, through July 31, 2001, among the withheld e-mails and IMs. I do note that there are several e-mails to and from Pequot's General Counsel at the critical time relating to "investment decisions."

A second possible source, and probably the only realistic one for GE/HF, is the backup tapes. There are four classes: the Andor tapes, the missing tapes, the damaged tapes, and the non-exchange server tapes. Irvine Pollock and Larry Storch have been hired for the task of ascertaining what happened to the missing tapes, locating any other non-exchange server tapes with e-mails, and retrieving any e-mails from the damaged tapes. I see Pollack-Storch as PCM's protective wall of integrity around the tapes. Shame on anyone who suggests Pollack-Storch is not getting to the bottom of backup tape brouhaha. As you know, I have written Audrey Strauss regarding the newly discovered non-exchange server tapes and got a reply form Larry Storch, which did not respond to my questions, e.g., which Pequot employee had possession of the recently discovered non-exchange server tape from which e-mails were retrieved. I think Audrey has the best of all worlds right now regarding these three categories of tapes: the Pollock-Storch wall of integrity and my inability to press them for answers to pertinent questions. Mark's call last week to Fried Frank may get Pollack-Storch to concede they simply represent Pequot.

The circumstances involving the backup tapes may be an obstruction of justice case. How and when did dome of the tapes get damaged? How did some get lost? If I have to take this on without some guidance, it is a very big job.

That leaves us with the Andor tapes. I understand that Audrey will send me a response next week to my request from legal authorities supporting Pequot's assertion of privilege.

C. ***Peter Dartley.***

So far, outside of Samberg, Pequot e-mails/documents indicate only one other Pequot employee knew anything about the GE/HF trades, Peter Dartley. On July 11, 2001, Samberg wrote Dartley, "Where are we on HF?" Dartley was Samberg's chief trader in July 2001. Samberg dealt directly with him and often gave him directions to make trades. The quote above suggests that this was done on HF. Dartley posted the HF trades and the GE trades to the handwritten Pequot trade blotter.

Dartley was also an intermediary when Samberg needed information about engaging in an arbitrage transaction on GE-HF after the announcement of the acquisition but before the close. Other e-mails suggest that Dartley was Samberg's confidante on investment decisions and other matters.

Pequot's employment list indicates that Dartley started work with Pequot in 1994 and never left. This is not accurate. The Chief Trader at MS told me that Dartley left (I think retired from) Pequot and later rejoined Pequot some time in 2003 in his current position as a "Managing Director." His new assignment was to restructure Pequot, an assignment that says volumes about Samberg's trust in Dartley. If any incriminating e-mails exist, I suspect they would be between Samberg and Dartley.

I think we should issue a subpoena for all e-mails to and from Dartley from January 1, 2001, to the present, as we have with 34 other Pequot employees. He should also go to the top of the testimony list.

D. The emerging mosaic of Samberg's activities during June and July 2001

As you know, Nancy has been working on an Excel spreadsheet that includes key e-mails to and from Samberg, including those to/from or mentioning Mack. It also contains trading info and info from the GE-HF chronologies. Relevant data from phone records and credit cards will be entered as it arrives. This mosaic, especially with input from CSFB or MS regarding Mack, could become a clearer and clearer picture of the path of the tip.

E. Calls to former Pequot employees

2001 was a turbulent year at Pequot. Many people left with Dan Benton to form Andor. Others simply left. Some appear to have been fired. Eric and I have frequently discussed questioning former Pequot employees. Of course, the closer they were to Samberg in June or July 2001, the better. One obvious candidate is Wendy Chicosky Samberg's secretary in June and July of 2001. She left in mid-October 2001, which means she could have gone to Andor. Among other things, she kept his daily calendar. There is a dilemma here: if we call former Pequot employees, they may not talk because of the confidentiality agreements they signed; if we take their testimony, they may get "lawyered up" by Fried Frank selections before they testify.

From: Aguirre, Gary J.
Sent: Wednesday, June 29, 2005 5:11 PM
To: Kreitman, Mark J.
Subject: Mack and CSFB subpeonas

Mark:

As you know, I have asked to issue a subpoena to CSFB and to take the testimony of John Mack in connection with Samberg's $80 million trades in GE and Heller shortly before the public announcement of the GE's acquisition of Heller. I suggested in my e-mail to you of June 27 in summary fashion why Mack was a logical source of the tip and also suggested in my memo of June 28 that this was the next logical step in this investigation.

The reasons are the following:

1) Mack had access to this information from two sources, since he had recently left Morgan Stanley, which represented GE, and moved to CSFB, which represented Heller;
2) Mack had communications with Samberg on at least two critical times during the Samberg's trading, including a call after the close on the Friday before the Monday when Mack began trading; we have no other leads at this time of people who likely knew of the acquisition that had contact with Samberg shortly before he began trading;
3) I have questioned Samberg about all individuals who were identified in chronologies who had knowledge before July 2, 2001 of the Heller acquisition, and Samberg denies he had contacts with any of them; this suggests that the tipper was not directly involved in the acquisition;
4) Samberg would likely have a relationship of trust with the person from whom he accepted the information, Mack meets that criteria,
5) There were a number of motives for Mack to pass this information along to Samberg:
    a) Mack was admitted directly into Pequot deals, e.g., the night that Mack is suspected of giving Samberg the tip, Samberg arranged for Mack to get a $5 million piece of a Lucent investment subsidiary that was being sold at a fire sale;
    b) Mack got to put at least $7 million (likely much higher) into Pequot funds that were closed; these funds had sensational returns at that time, including $5 million into one of the funds that was allocated 5.4 million in profits from GE-HF;
    c) Samberg was proposing Mack as a director on two boards;
    d) They were very close friends, e.g., Samberg's secretary says "Mack loves you"; Samberg was in desperate need at that time for some big hits, since his all star protégé was leaving about half of Pequot employees and Samberg was worried that more would leave;
    e) Mack solicited and obtained Samberg's stock tips;

f) Other consideration that does not show up in the Pequot e-mails.

Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation. First, Bob has instructed me to stock with the GE-Heller investigation. The Samberg-Microsoft investigation is on hold until David Anders and the FBI speak with David Zilkha. That matter really depends on whether Zilkha tells the FBI that he tipped Samberg around April 9. If he does, David Anders will likely continue the matter as a criminal investigation. If Zilkha does not admit he tipped Samberg, we would have the same problem.

As I mentioned in my June 28 memo, the second best source of proving the Samberg GE tip is from the backup tapes. I am not permitted to speak with either Pollack or Storch, who are handling this matter and Audrey refers me to them. That effectively closed off this source. The other possibility is to take extensive testimony from Pequot employees in this regard. I have already taken five examinations trying to pin down this issue. Further, taking two weeks of testimony on this issue that may not be productive is not how I interpret Bob's guidelines.

I have proposed that we obtain the documents from CSFB that would show when Mack obtained information about GE-HF. I suspect that Mack learned during an orientation at CSFB. I would be looking for information that Mack knew about GE-Heller as well as information when Mack learned. Evidence that Mack learned near or on Friday June 29, the night of his call to Samberg, would tend to focus the matter more on Mack. Evidence that he did not learn until July 3 or never learned would eliminate him. From the newspaper accounts, I have inferred that there were some arrangements between Morgan Stanley and John Mack in early June. This is consistent with an orientation later in the month during which Mack learned about the GE-HF matter, perhaps 10 days to 2 weeks before the public announcement that he was Morgan Stanley's CEO.

I understand you have denied my request to proceed with the CSFB and Mack subpoenas

Gary

From: Aguirre, Gary J.
Sent: Tuesday, July 19, 2005 12:00 PM
To: Kreitman, Mark J.; Hanson, Robert
Cc: Ribelin, Eric; Eichner, Jim; Jama, Liban A.
Subject: Lynch

Lynch will thus be in a position to have orchestrated the document production from both CSFB and Morgan Stanley relating to Mack. Having access to our CSFB and Morgan Stanley subpoenas, he should understand exactly where we are going.

Per earlier discussions, Lynch seemed to have an agenda that did not relate to my discussions with Patalino. I suspect Patlino is also leaving with Lunch (as he did from Davis Polk when Lynch Left) for Morgan Stanley. He turned the matter over to someone last week, saying he would be staying at home this week.

This puts in perspective brief call from Ashley Wall (Morgan Stanley counsel) on Friday, when she called to say there would be no more Mack e-mails. A week before she told me that they were still working on producing some additional e-mails relating to Mack and would be searching backup tapes. Her tone on Friday, which is usually fairly light, seemed strained. I asked her how she already knew that there would be no Mack e-mails in backup tapes, but her answer made no sense. She agreed to explain the reason in a letter. This was a mild red flag, but I did not make much of it because MS has been very cooperative until now.

Here's the language from our current subpoena:

1. All electronic mail sent to John J. Mack ("Mack"), or any of his secretaries, assistants, or others acting on his behalf, from January 1, 2001, through March 31, 2001, from Arthur J Samberg ("Samberg"), or from any agent, officer or employee of Pequot Capital Management ("PCM");
2. All electronic mail from Mack, or any of his secretaries, assistants, or others acting on his behalf, from January 1, 2001, through March 31, 2001 to Samberg, or to any agent, officer or employee of PCM;
3. All electronic mail sent to Mack, or any of his secretaries, assistants, or others acting on his behalf, from March 1, 2001, through August 30, 2001, from any agent, officer or employee of MS; and
4. All electronic mail from Mack, or any of his secretaries, assistants, or others acting on his behalf, from March 1, 2001, through August 30, 2001 to any agent, officer or employee of MS.

I suggest another call to Ashley tomorrow or Thursday with Liban, Jim, or both to pin down exactly the situation on the Mack e-mail subpoena.

Fr m: Aguirre, Gary J.
Sent: Wednesday, July 27, 2005 5:22 PM
To: Berger, Paul; Kreitman, Mark J.
Subject: Re: Mark's e-mail of July 25

Paul and Mark:

This replies to Mark's e-mail of July 25, which in turn replied to mine of June 28 (attachment 13). I wrote and sent my e-mail immediately after a heated discussion with Mark on June 28, memorializing what had transpired. I do not understand why it would take four weeks to respond. I am also copying Paul because the timing of Mark's e-mail suggests it was triggered by my conversation with Paul on the same points late last week. Mark's July 25 e-mail reads:

> **From:** Kreitman, Mark J.
> **Sent:** Monday, July 25, 2005 7:15 PM
> **To:** Aguirre, Gary J.
> **Cc:** Hanson, Robert
> **Subject:** RE: Mack and CSFB subpoenas
>
> I need greater specificity than the information provided here. Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall, is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view. The contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational. The fact that we have not identified other potential tippers is of only marginal significance. Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. The evidence of motive Mark cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. I have clarified the role of Irv and Larry, which should assuage your anxiety to some degree. I have at no time "denied [your] my request to proceed with the CSFB . . . subpoena." To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the sine qua non for focused investigation of Mack.

For ease of reference, I have separated the Mark's comments made in his e-mail of July 25 into sub-points and then respond to each sub-point in the bracketed comments.

1) I need greater specificity than the information provided here. [My June 28 e-mail was not intended to specify the factual support for the Mack testimony-CSFB subpoena course of action. It merely confirmed my understanding that Mark had rejected both courses of action during the heated meeting we had a few minutes

earlier. The factual support for these two steps was discussed in the two lengthy e-mails and two spreadsheets I gave Mark on June 27 and June 28 (see attachments 9-12) and to lesser extent in the series of e-mails that I had circulated since June 3 when it was announced that Mack would become Pequot's new CEO (attachments 1-8).

2) Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. [Not likely: all communications regarding Mack's position at CSFB during the critical period before July 2 were between Mack and Credit Suisse Group Chairman Lukas Mühlemann **in Switzerland**, except for two meetings with CSFB CFO and a CSFB attorney. The July 30, 2001, Business Week discussed how Mack went to CSFB: "**Since April,** he [Mühlemann] had been wooing Mack--who left Morgan Stanley on Mar. 21 after losing a power struggle with CEO Philip J. Purcell--to take on one of the toughest jobs on Wall Street." So far, despite my request, CSFB has not produced anything to or from its Swiss parent regarding Mack. When I ask about it, his underlings tell me Lynch is looking into it. Patalino has politely suggested: "Why don't you get it from Mack?" (See attachment 14) Until we talk to Mack, we don't know who he might have spoken with at CSFB before he was hired. CSFB has expressed reluctance to restore all backup tapes for all employees for the period from April through July 2001 and I have not asked them to do this.

3) The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall, is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view. [There was no wall to go over before. The question is: did anyone tip him off during the period that Mühlemann and CSFB's CFO were wooing him to go to CSFB. Nor need the subpoena be intrusive; it could be handled very smoothly: a short session during which we simply ask if and when he found out about the acquisition. The other possible source is Morgan Stanley. Currently, we are exploring possibilities at CSFB and Morgan Stanley. Mack's testimony, as I explained in our pre-meeting memo of June 28 (attachment 10), could have helped us focus our investigation.

4) The contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational. [We have four Mack-Samberg contacts during April through July 2001. One was on the Friday night before Samberg started trading his trading on the next Monday.]

5) The fact that we have not identified other potential tippers is of only marginal significance. [If we had just begun to look, I would agree. I have been through Samberg's personal calendar, what phone records we have, all his e-mails for the relevant period, searched through about the million Pequot e-mails for 2001, questioned Samberg about his relationship with everybody involved on all sides of the deal (JP Morgan, CSFB, Merrill Lynch, GE and Heller) in the deal. I have looked through all relevant CSFB e-mails and Morgan Stanley e-mails. There are no connects. Nor is there anything else to suggest that he learned from any of

these people. I have screened possible connects on the acquisition teams through the 3.5 million Pequot database to look for leads. There were none. The tipper must connect a lot of dots: access to info, motivation at the key time, trusting relationship with Samberg, communications at key time with Samberg. No one else connects these couple of dots; Mack connects all of them.]

6) Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. [It's not the trust factor in isolation as Mark suggests; it's one factor in a profile. Suppose an eye witness describes his assailant as a 6'1" white male, weighing over 300 pounds, balding with a common tattoo on his forearm. It does not make everybody with the same tattoo a suspect. Just the same way, the tipper must meet the whole profile: have possible access to information, and spoke with Samberg at the key time, had a motive, and was trusted by Samberg. Mack does not simply have the common tattoo on his arm; he meets the whole profile.]

7) The evidence of motive Mark cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. [As discussed above, the June 28 e-mail, to which Mark responds, was not intended to specify the details regarding motive. That was done in the memos and two spreadsheets I gave Mark just before the meeting (attachments 9-12). In general, I do not believe that Mack's tips to Samberg would have been on transactions where they split a profit. That's too crude and created unnecessary risk. More likely, they just did favors for each others like some of those discussed below.

   a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. Mack was pouring money into these funds in 2001, even though all (but one) were closed. In general, the funds had a $5 million lower limit. E-mails show Mack putting at least $13 million into these funds. This included the Scout fund which had the highest return but was closed at that time. Scout is also one of the three funs that consistently appear on the SRO referrals. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds. Similarly, Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million info Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) *Board seats* As shown on one of the spreadsheets (attachment 12), Samberg was promoting Mack for board seats on both Baby C and Fresh-start.

c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.

d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."

e) *Friendship* Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo (attachment 9).

8) I have clarified the role of Irv and Larry, which should assuage your anxiety to some degree. [This was done after I resigned and only after Jim Eichner disagreed with Mark on the same issue.]

9) I have at no time "denied [your] my request to proceed with the CSFB . . . subpoena." To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the sine qua non for focused investigation of Mack. [I'll be specific. I proposed in my 6/20 and 6/24 e-mails (see yellow highlighted language in attachments 3 and 8) to Bob that we serve a second subpoena on CSFB. When I did not get an answer, I asked Bob about it. He said it was Mark's decision. I therefore included my request to broaden the CSFB subpoena in my June 28 e-mail to Mark: **"My view is that we should broaden the subpoena to obtain (1) all communications between Mack (we now have his e-mail address just before he started with CSFB) and CSFB for the two months before he began with CSFB and (2) all documents relating to his phase in as CEO at CSFB generated during June and July 2001.** Further, I think we need to take Mack's testimony and simply nail down whether he will admit that he knew about the GE/HF acquisition from any source." Mark said he had read the above memo before we spoke on June 28. He made clear to me that he disagreed with what I had proposed. I first learned that Mark had changed his mind after I told Bob I was resigning.]

I also believe Mack's testimony should have been taken promptly for the same reason that staff normally takes early testimony of suspected participants in an insider trading investigation--to pin them down. This is particularly true here because CFSB and Morgan Stanley are still producing e-mails. Further Morgan Stanley will be friendly because Mack is now its CEO. CSFB will be friendly to Mack because Gary Lynch, who is going to Morgan Stanley in a couple of months to join Mack, controls the CSFB production responsive to our subpoena. Further delay allows Mack to concoct a story that is consistent with the information contained in the e-mails. On the other hand, if he did

not provide information, that also may become clear. As discussed in my June 28 e-mail to Mark (Exhibit 10), this would allow us to focus on other possible sources for the tip.

I had different and more troubling input why it was difficult to move ahead with the second CSFB subpoena and the Mack testimony. I sent two e-mails to Bob during the week of June 20 (see attachments 3 and 8) proposing that we proceed with the Mack testimony and broaden the CSFB subpoena. When I did not hear back from Bob, I spoke with him directly about these proposals. Bob told me 1) that these decisions were for Mark to make and 2) it would be an uphill battle because Mack had powerful political connections. Bob also mentioned this concern during a meeting with Mark and me. Bob's comment about Mack's political influence became more real when I learned on June 27 that documents I had subpoenaed from Morgan Stanley were faxed by Mary Jo White (who had never represented anyone in the investigation) directly to Linda Thompson (see attachment 15), before Morgan Stanley produced them in the investigation. On the preceding Friday, June 24, Bob also met privately with Paul about the investigation I was handling. Likewise, Mark and Bob did not invite me to participate in the meeting on June 27 when they discussed Mack's possible testimony. This combination of events suggests to me that the issue whether Mack's testimony would be taken was being handled differently than the same issue for other witnesses in this investigation and different from the same issue in other investigations. Further, I do not believe that treating Mack differently is consistent with the Commission's mission, at least as I understand it.

My comments above deal with one situation that I found very demoralizing. I am preparing a second memo-e-mail addressing other events that will place the above in perspective.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

From: Kreitman, Mark J.
Sent: Monday, July 25, 2005 7:15 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert
Subject: RE: Mack and CSFB subpeonas

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From: Aguirre, Gary J.
Sent: Thursday, June 30, 2005 9:29 AM
To: Kreitman, Mark J.
Subject: FW: Mack and CSFB subpeonas

Corrected e-mail sent yesterday

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

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    f) Other consideration that does not show up in the Pequot e-mails.

Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation. First, Bob has instructed me to stock with the GE-Heller investigation. The Samberg-Microsoft investigation is on hold until David Anders and the FBI speak with David Zilkha. That matter really depends on whether Zilkha tells the FBI that he tipped Samberg around April 9. If he does, David Anders will likely continue the matter as a criminal investigation. If Zilkha does not admit he tipped Samberg, we would have the same problem.

As I mentioned in my June 28 memo, the second best source of proving the Samberg GE tip is from the backup tapes. I am not permitted to speak with either Pollack or Storch, who are handling this matter and Audrey refers me to them. That effectively closed off this source. The other possibility is to take extensive testimony from Pequot employees in this regard. I have already taken five examinations trying to pin down this issue. Further, taking two weeks of testimony on this issue that may not be productive is not how I interpret Bob's guidelines.

I have proposed that we obtain the documents from CSFB that would show when Mack obtained information about GE-HF. I suspect that Mack learned during an orientation at CSFB. I would be looking for information that Mack knew about GE-Heller as well as information when Mack learned. Evidence that Mack learned near or on Friday June 29, the night of his call to Samberg, would tend to focus the matter more on Mack. Evidence that he did not learn until July 3 or never learned would eliminate him. From the newspaper accounts, I have inferred that there were some arrangements between CSFB [prior draft erroneously referred to Morgan Stanley] and John Mack in early June. This is consistent with an orientation later in the month during which Mack learned about the GE-HF matter, perhaps 10 days to 2 weeks before the public announcement that he was Morgan Stanley's CEO.

I understand you have denied my request to proceed with the CSFB and Mack subpoenas

Gary

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 12:12 AM
T : Berger, Paul
Subject: Mack Testimony

Paul:

You had requested my analysis why John Mack's testimony should be taken. I had delayed sending it to you in hopes that Mark would be open to this possibility. However, Mark recently told me *again* that I would have to establish that Mack went over the wall before I could take his testimony. This does not make sense to me or to other staff. I am therefore submitting my analysis directly to you.

I will also be sending you the memo I mentioned during our discussion in my office in mid-July, dealing with the factors that led up to my resignation. I have not had time to prepare it because of the demands of Pequot, my EEOC brief due on August 15 and my scheduled vacation.

Gary

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:34 PM
To: Hanson, Robert
Subject: Mack testimony

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information

The first element is whether Mack had possible access to information that GE would make a tender offer for HF. He had access from two sources: he had been the CEO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time. Also, CSFB was "wooing"

Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or CS to mention, as part of this wooing process, what inventory Mack would be taking over. Incidentally, we know how Samberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HF during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team as Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller.

a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million info Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "busting his chops" Samberg's chops because he had not got the documents on this investment.

Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) *Board seats* As shown on one of the spreadsheets, Samberg was promoting Mack for board seats on both Baby C and Fresh-start.
c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.
d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."
e) *Friendship* Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo.
f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Samberg had a relationship of trust deep friendship with Mack.

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend.

In July 2001, Samberg's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and ***I did things in a manner that was expedient at the time given my expertise in this area.***

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. ***Times were fragile.*** I needed their approval to do whatever I wanted to do ***or they might walk*** (emphasis added).

There do not appear to be other leads in the Samberg e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Samberg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Samberg's circles.

Gary

From: Ribelin, Eric
Sent: Thursday, December 02, 2004 3:23 PM
To: Wiederkehr, David
Cc: Aguirre, Gary J.; Glascoe, Stephen
Subject:

Dave,

Gary Aguirre has a promising case of insider trading episodes by a large hedge fund in multiple issuers over several years. Can we sit down with you guys next week for a brainstorming session on how we might get all relevant data (e.g. account statement information, phone calls, etc.) into a database? Thanks. Eric.

From: Chretien-Dar, Barbara C.
Sent: Tuesday, March 08, 2005 8:29 AM
T : Aguirre, Gary J.
Cc: Kreitman, Mark J.; Hanson, Robert; Ribelin, Eric; Foster, Hilton; Murphy, Brian P.; Chretien-Dar, Barbara C.
Subject: RE: HO 9818, books and records issues un IA Act

We've always viewed the language of 34 Act rule as being much broader than the IAA rule. The 34 Act rule requires a BD to keep all records relating to its "business as such." The IAA rule requires that IAs "the following" books and records and then provides a specific list of required records, including sent and received communications relating to investment recommendations.

While I agree that, as a policy matter, it makes sense to require advisers to keep all records relating to their investment recommendations (whether internal or external), we'd like to make reasonably certain that the rule can be read that way or in the manner that you suggest (e.g., Pequot is both the IA and is acting on behalf of the client and thus any communication relating to the client's investments should be viewed as a communication "sent or received"). We're going to check whether there is any adverse authority that would be inconsistent with this approach.

Barbara

From: Aguirre, Gary J.
Sent: Monday, March 07, 2005 7:34 PM
To: Chretien-Dar, Barbara C.
Cc: Kreitman, Mark J.; Hanson, Robert; Ribelin, Eric; Foster, Hilton; Murphy, Brian P.
Subject: RE: HO 9818, books and records issues un IA Act

Ms. Chretien-Dar:

Since sending my earlier e-mail, I have taken a closer look at *In The Matter Of Banc of America Securities,* Admin. Proc. File No. 3-11425. I suggest the decision may answer the issues raised in my last e-mail.

First, regarding e-mails, the case relied on the language of Rule 17a-4(b)(4)' which "requires broker-dealers to 'preserve for a period of not less than 3 years, the first two years in an accessible place... *[o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating* to his business as such.'" The case then held that the above language applies to e-mails.

A similar requirement and even similar language is found in Rule 204(a) which requires that "Every investment adviser ... shall make and keep true, accurate and current the following books and records relating to its investment advisory business: *Originals of all written communications received and copies of all written communications sent by*

such investment adviser relating to (i) any recommendation made or proposed to be made and any advice given or proposed to be given..." Rule 204-2 requires these documents be preserved for a period of five years. Since the operative language is nearly the same in both rules, should not Rule 204-2(a)(7) apply to e-mails as well, just as the similar language of 17a-4 does?

Rule 204-2(a)(7) would also seem to apply to the decision making process by which an investment adviser that manages hedge funds, such as Pequot, makes decisions for its family of funds. The application of Rule 204(a)(7) to a hedge fund adviser, such as Pequot, differs from the routine two-party transaction involving a fund adviser. In latter case, communications from the adviser to the client obviously fall within the rule. In the case of the Pequot family of hedge funds, Pequot Capital Management does not merely give advice to its hedge fund clients; it actually makes the decision to do the trade and then executes the trade in one transaction. Would not the decision to do the trade for the third party hedge fund also effectively include the communication to do the trade? Hence, shouldn't that implicit "communication" be subject to Rule 204-2(a)(7)?

Regards,

Gary

From: Chretien-Dar, Barbara C.
Sent: Monday, March 07, 2005 5:28 PM
To: Aguirre, Gary J.
Cc: Kreitman, Mark J.; Hanson, Robert; Ribelin, Eric; Foster, Hilton; Chretien-Dar, Barbara C.; Murphy, Brian P.
Subject: RE: HO 9818, books and records issues un IA Act

Gary,
Seem my thoughts below (in red). Sorry for the delayed response. Brian Murphy will take a closer look at your second question

Barbara

-----Original Message-----
From: Aguirre, Gary J.
Sent: Monday, February 28, 2005 10:37 AM
To: Chretien-Dar, Barbara C.
Cc: Kreitman, Mark J.; Hanson, Robert; Ribelin, Eric; Foster, Hilton
Subject: HO 9818, books and records issues un IA Act

Chretien-Dar, Barbara

Ms. Chretien-Dar:

Obtaining documents and other information from Pequot Capital Management in this matter seems to be encountering the same types of delaying tactics that were encountered by the Commission in Bank of America Securities. Accordingly, as one option, we are examining the possibility of an administrative action similar to the one brought in Bank of America Securities, but brought under the books and records provisions of the Investment Advisors Act of 1940.

In particular, we are looking at section 204 of the Act and Rules 204-2(a)(3), which we have already discussed, Rule 204-2(a)(7), which have not discussed.

As I read Section 204, there is a threshold question regarding the scope of its reach. Under a strictly literal interpretation of section 204, the Commission would have access to all existing "records" in the possession of an Investment Advisor. It is my understanding that this is the position taken by OCIE, though it has not been pushed to the point of enforcement. On the other hand, Section 204 may be interpreted to only allow access to an IA's records which an IA must maintain under the rules promulgated under Section 204. What is IM's interpretation? I've had conversations in the past with Doug on this issue -- our view is the same as OCIE. Under a literal statutory approach, the C. staff should have access to all existing records, even if certain of those records are not required to be maintained.

Regarding rule 204-2(a)(7), we understand OCIE takes the position that the rule reaches all writings, including e-mails, generated during the process of making the trading decision. This would include for example the recommendation of an analyst which was relied upon by a portfolio manager who made the trading decision. What is IM's interpretation? I don't think we have an "official" interpretation. I can see where the rule might be read NOT to include an advisers **internal** communcation (email or other) because it refers to communications sent and received by the adviser. At the time the rule was drafted, it did not contemplate emails. I would certainly view emails sent to persons other than employees of the adviser as included if they relate to the content specified in the rule because emails are unquestionably "written communications.". We'll dig a little on the internal email issue.

We would appreciate any guidance IM could offer on these two issues.

Cordially,

Gary Aguirre

From: Ribelin, Eric
Sent: Tuesday, December 07, 2004 4:05 PM
To: Cella, Joseph J.
Cc: Aguirre, Gary J.; Foster, Hilton; Glascoe, Stephen
Subject: Pequot

In Pequot (HO-9818) trading in 15 issuers is being looked at. Many of these are referrals from SROs. It was Hilton's thought that in addition to our investigation, the SRO's might expand on investigations that led to their referrals to look at other trading in those issuers for possible connections to Pequot. We don't have the secrecy concerns that we had in Freeman. Thoughts?

From: Aguirre, Gary J.
Sent: Wednesday, February 09, 2005 6:27 PM
To: Kreitman, Mark J.; Hanson, Robert
Subject: RE: HO 9818

I'll speak with her tomorrow.

From: Kreitman, Mark J.
Sent: Wednesday, February 09, 2005 6:27 PM
To: Hanson, Robert; Aguirre, Gary J.
Subject: RE: HO 9818

Agree with Bob. We might reconsider if they cooperate fully, including, most importantly, full production of backup email tapes (and search for specific production if we request); and if they will all be made available sequentially in one or two long workdays.

From: Hanson, Robert
Sent: Wednesday, February 09, 2005 4:43 PM
To: Aguirre, Gary J.
Cc: Kreitman, Mark J.
Subject: RE: HO 9818

They should come here. We too are professionals, with busy schedules.

From: Aguirre, Gary J.
Sent: Wednesday, February 09, 2005 4:27 PM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: FW: HO 9818

Robert:

What do you think about Ms. Clavere's request below? About the highlighted statement (staff taking the exams in San Francisco), we did schedule the exams in SF, but they were postponed as I began to learn they had produced few emails (see my email below). A few days after my email, they told me that Broadview had not kept incoming emails. Also, they have thus far not told me whether they have looked on their backup tapes, despite several requests.

As for her reasons, I think we will hear the same from others if we agree. I could probably work around the employees issues, but Ms. Clavere's unavailability layered on top makes it tough within our schedule.

Notwithstanding the above, I would be happy to go there if she got cooperative, which at times has hinted that she might

Your thoughts?

Gary

From: Clavere, Eilleen [mailto:eclavere@klng.com]
Sent: Tuesday, February 08, 2005 8:21 PM
To: 'Aguirre, Gary J.'
Cc: Guo, Xinxin; Phillips, Richard M.
Subject: RE: HO 9818

Mr. Aguirre: You recently told me that Staff has now decided to subpoena the testimony of 6 Jefferies & Co. employees in Washington D.C. instead of San Francsico as originally planned with additional witnesses to follow including a witness who can detail Jefferies & Co.'s efforts to find and produce Broadview emails. This decision, to bring witnesses to D.C. will impose substantial hardships, both professionally and personally on Jefferies and the individuals involved and I write to request that Staff reconsider and hold the testimony in San Francisco as originally planned.

First, the professional hardships. [redacted] Testimony in Washington D.C. would require, in addition to the time already spent preparing, that each individual spend an additional three business days on the investigation, two for travel and one for the testimony. In addition, Jefferies has been told to brace itself for additional employees to be subpoened. When totaled up, Jefferies will lose at a minimum at least 20 business days of productivity and probably more.

Moreover, some of the witnesses are very senior professionals who have extensive business commitments and travel in the next several months wasbooked far in advance. Michael Kelly, Paul Crisci and Kaithan Agrawal travel extensively on business. Mr. Kelly for example, who is a Vice Chairman and Senior Managing Director, is in South America until February 13 and then is in Australia form March 10 through the 24th. Mr. Crisci, a Managing Dirctor, travels regularly on client business.

Second the personal hardships. Many of the individuals have children and childcare commitments that would make a three day travel trip to Washington D.C. very burdensome. Others have made and paid for vacations. For example, Theresa McCoy is traveling to Asia with her children from March 25th through April 11 and returns on April 12 to attend her Mother's 90th birthday. Mr. Crisci has vacation plans the weeks of Feb. 14-18 and March 29 through April 2. Mr. Agrawal is getting married on February 25 and then leaves for a honeymoon. Also, as the principal attorney handling this matter, I am out of the country with my children from April 8 returning April 25.

Jefferies acknowledges that cooperating with an SEC investigation is one of the costs of doing business as a regulated entity. However, Jefferies believes that the cost of sending seven plus Jefferies employees, some of whom are very senior professionals, is extraordinary and burdensome especially in light of the ongoing resources that will be required to respond to Staff's document requests and additional requests for testimony. We ask Staff to reconsider its position and conduct the testimony in San Francisco at a mutually convenient date. Thankyou for your courtesy.

Eilleen M. Clavere
Kirkpatrick & Lockhart Nicholson Graham LLP
San Francisco, CA
tel. 415.249.1047

fax 415.249.1001
e-mail eclavere@klng.com

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From: Aguirre, Gary J. [mailto:AguirreG@SEC.GOV]
Sent: Friday, February 04, 2005 2:11 PM
To: Clavere, Eilleen
Subject: HO 9818

Ms. Clavere:

You have requested that the examinations of Broadview employees and officers be taken on the West Coast for various reasons. In general, we prefer to take the examinations here in Washington. This is particularly so when multiple parties are involved, as there are here. Still, upon receipt of your email, I will look into it.

I am also requesting clarification on two matters that relate to my letter of December 1, 2004.

First, we are requesting that your client provide us with a summary of what was done to comply with our request for the e-mails of certain employees. In this regard, did you search or review Jeffrey's or Broadview backup tapes? Further, what steps were taken to make sure that you located all backup tapes that might contain the requested emails? Finally, was the search limited to certain folders or were all email folders searched for the requested email?

The other matter relates to your inquiry yesterday about a problem our IT staff had encountered with two of the CDs that your client had submitted. As I understand the problem, it relates to the telephone records. Unfortunately, the information was not submitted in the standard SEC format. More specifically, the data are not readily loaded into iConect/Concordance. Additionally, they only contain TIF files and no document boundary information. Finally, the CDs do not include OCR text.

Your assistance in this regard is appreciated.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-942-4675
Fax: 202-942-9519
mailto: aguirreg@sec.gov
-----Original Message-----
From: Aguirre, Gary J. [mailto:AguirreG@SEC.GOV]
Sent: Monday, December 27, 2004 9:26 AM
To: Guo, Xinxin
Subject: RE: Pequot Call today

Ms. Guo:

Since some question has arisen whether we have all requested emails, we are postponing the examinations scheduled for January 4 and 5.

Sincerely,

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-942-4675
Fax: 202-942-9519
mailto: aguirreg@sec.gov

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Ms Guo's response:

Thanks. We will get back to you as soon as we find out more about the emails.

From: Aguirre, Gary J.
Sent: Friday, May 20, 2005 9:19 AM
To: Hanson, Robert
Subject: RE: GE

I'll call them.

Thanks

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-942-9519
mailto: aguirreg@sec.gov

From: Hanson, Robert
Sent: Friday, May 20, 2005 8:33 AM
To: Aguirre, Gary J.
Subject: RE: GE

It's okay if you call them back without me as far as I'm concerned. Tell them you talked with me. Alternatively I can call them back and tell them to comply with the request.

From: Aguirre, Gary J.
Sent: Friday, May 20, 2005 8:22 AM
To: Hanson, Robert
Subject: GE

I have growing suspicions about why and how this call came to you. Eric and I would like to be present for the callback.

Here are the facts in a little more detail and the dates with a little more accuracy than I recalled yesterday.

The first subpoena was served on March 26, not in April. It sought e-mails between GE and Pequot or Heller and Pequot for a one year period: before, during and one month after Samberg's trading. GE's legal staff assigned the matter to Kathleen Turland, the new attorney with GE commercial.

I had multiple conversations with her during March and April but was getting nowhere. Her consistent story through April and the beginning of May was that no e-mails were available for either company.

On Sunday, May 8, I compared the Heller and GE chronologies with the trade blotter and noticed an obvious pattern: Samberg had increased his bet on the GE-Heller acquisition as the likelihood increased. That was the same day that I found the short.

During the week of May 9, I began to press GE about the e-mails. I reviewed with Kathleen the list of individuals who were involved in the acquisition obtained from GE's and Heller's 2001 chronologies. I also told her that I would like to see GE and Heller's written e-mail retention policies. Later in the week, she called me back to inform me that GE had located a Heller server that could be restored so that Heller's e-mails would be available. She also told me that there were different retention policies in effect for GE and would be difficult to reconstruct them, which sounded more and more evasive. During this call, I told her that it was difficult to believe that a company of GE's stature would not have such policies and that I would be subpoenaing GE staff to get statements under oath if she could not find anything. Late in the week she e-mailed a 1999 memo that said the retention policy was thirty days with exceptions. I will forward her e-mail when I get to the office. I did not feel any further discussion would be productive. So, on Monday, I sent out the IT and custodian subpoenas. Because GE had risen to the top of my list, I included subsection seeking docs related to GE-PCM deals.

I would like to find out what contact GE legal staff has had with FF and why they knew to call you.

Gary

From: Kreitman, Mark J.
Sent: Sunday, February 27, 2005 11:38 AM
To: Hanson, Robert; Aguirre, Gary J.; Ribelin, Eric
Subject: Draft

Dear Audrey,

I'm a bit at a loss to understand the statement in your letter of February that each individual we've subpoenaed for investigative testimony will now retain separate counsel -- in addition to your firm -- as a result of "the tenor" of our recent conversation, and your new demand that testimony be delayed to accommodate not only your personal schedule, but those of additional new counsel as well, at least one of whom you indicated in telephone conversation, has not yet been retained. In our recent conversation, to which you refer, we advised that, in light of our duty conduct securities fraud investigations promptly and efficiently -- and the fact that at least three Fried Frank partners and several associates represent each subpenaed party -- we cannot consent to indefinite delay of testimony as you request so that you can personally can attend every testimony session when your busy schedule permits. I hope you don't mean to suggest that your new demand is a tactical response which would, as I'm sure you agree, might possibly be construed as unprofessional, unethical, even potentially illegal obstruction of a federal investigation. Please clarify.

In any case, as testimony is not scheduled to commence until mid-March, it will, barring our receipt of affidavits setting forth good and sufficient reason for any delay, proceed as noticed.

Cordially,
Mark

From: Kreitman, Mark J.
To: Aguirre, Gary J.; Hanson, Robert; Foster, Hilton; Ribelin, Eric
Cc:

Subject: RE: Fried Frank Style Cooperation
Sent: 2/23/2005 4:32 PM
Importance: Normal
Agreed. We need to continue to document this pattern of behavior with a view to possible §17(b) charge and perhaps some disciplinary action against the law firm.

-----Original Message-----
From: Aguirre, Gary J.
Sent: Wednesday, February 23, 2005 3:48 PM
To: Hanson, Robert; Kreitman, Mark J.; Foster, Hilton; Ribelin, Eric
Subject: Fried Frank Style Cooperation

Does this sound like cooperation?

Our November 24, 2004, letter, asking Pequot to identify the decision makers, set the dalivery dat for this info as follows:

"Please forward the requested information as soon as possible, but no later than December 17, 2004, to..."

The KH letter of February 22 states "As a practical matter, we could not determine whether a person satisfied the criteria of your November 24 request until we had an opportunity to interview that person. We have been conducting ongoing interviews of Pequot employees since December 17, 2004."

In short, Fried Frank began the interviews on the date the information was due.

From: Kreitman, Mark J.
Sent: Friday, February 11, 2005 9:33 AM
To: Ribelin, Eric; Aguirre, Gary J.; Hanson, Robert
Subject: RE: PQ Boston

Tough tone always appropriate to prosecutors, Eric.

-----Original Message-----
From: Ribelin, Eric
Sent: Friday, February 11, 2005 9:31 AM
To: Ribelin, Eric; Aguirre, Gary J.; Kreitman, Mark J.; Hanson, Robert
Subject: RE: PQ Boston

Sorry fellows for the tone of the email below. I'm frustrated by the gamesmanship and stalling. I do think we should explore all avenues.

-----Original Message-----
From: Ribelin, Eric
Sent: Thursday, February 10, 2005 6:08 PM
To: Aguirre, Gary J.; Kreitman, Mark J.; Hanson, Robert
Subject: Re: PQ Boston

I don't think that's an issue but I'm not a lawyer. This isn't rocket science - why not just get an opinion and put an end to the uncertainty? Should be able to do it in one or two calls.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Ribelin, Eric <RibelinE@SEC.GOV>; Kreitman, Mark J. <KreitmanM@SEC.GOV>; Hanson, Robert <HansonR@SEC.GOV>
Sent: Thu Feb 10 18:03:59 2005
Subject: RE: PQ Boston

Boston Office has been helpful on Pequot. May be worth a shot. I have in mind Robert's comment about the uncertain status of books and records applications to IAs.

From: Ribelin, Eric
Sent: Thursday, February 10, 2005 5:47 PM
To: Kreitman, Mark J.; Hanson, Robert; Aguirre, Gary J.
Subject:

Ken Lench believes we can go into the hedge fund and get emails under a cause exam. He thinks the Boston District Office folk would do it. He likes the idea. Thoughts? The writing is on the wall and it's clear Fried Frank is stalling.

From: Aguirre, Gary J.
Sent: Tuesday, October 26, 2004 5:16 PM
To: Foster, Hilton
Subject: Status and request

The action memo is done and had begun to get its various approvals so it can be submitted to the Commission.

Would you happen to have one or more of the letters requesting the chronology and name recognition?

As soon as I get draft letters and subpoenas pulled together, I would like to have planning session when you have the time.

Regards,

Gary

From: Foster, Hilton
Sent: Thursday, November 18, 2004 4:21 PM
To: Aguirre, Gary J.; Grime, Richard
Subject: Pequot

I established contact with Pequot and told them that we are about to embark on an investigation focusing on several referrals from the SROs on timely purchases by Pequot funds
I spoke with Aryeh Davis who will have their outside counsel, Fried Frank, [Audrey Strauss] contact me.

From: Aguirre, Gary J.
Sent: Monday, November 22, 2004 12:13 PM
T : Foster, Hilton
Cc: Grime, Richard; Cain, Charles
Subject: Pequot short term tasks

Hilton:

Here's how we agreed to split on what needs to be done on the short term. I am copying Richard and Charles so they know what's going on.

Hilton

1) Call Jim McColgan (212 656 -2452) at NYSE (My email and list of 8 NYSE referrals are immediately below. Jim's message was: I got the files, but I don't think you want all of it);
2) Contact Larry Oleary (212-306-1544) at AMEX. Same drill with him. My email and SRO referral list (2 matters) below.
3) Letter to PQ and list of documents
4) Call on SEC Staff attorney re getting files on Heller Financial

Together

1) PM Monday Call
    a) Roberts at DJO re Francios statement on 12/13
    b) Blue Coat re Verheeke
2) Call PQ

Gary

1) Email Richard re contacting judges in Rambus and Astra matters;
2) Set up dates for statements during week of 12/13 with Blue Coat, Broadview, DJO,
3) Coordinate 12/13 statement of Verheeke with Tim and Reid;
4) Contact Broadview re Dec 13 employee statements
5) Send out chrons and name recognition letters;
6) Finish bluesheeting;
7) All Contacts
    a) Who I am
    b) What I am doing
    c) Your companies stock trading is involved
    d) Requesting that you voluntarily produce documents

From: Aguirre, Gary J.
Sent: Wednesday, November 10, 2004 6:12 PM
To: 'jmccolgan@nyse.com'
Subject: Pequot related referrals

Jim:

As I mentioned today during our call today, I am requesting the NYSE reproduce and send a complete copy of its file or files on each matter identified on the attached spread sheet. I am also requesting that this request be interpreted inclusively. I am particularly interested in any notes prepared by NYSE staff of their conversations with the issuers or any other parties relating to these matters, e.g., the notes of the meeting between the NYSE staff and the law firm of Kirkpatrick & Lockhart on January 17, 2003, regarding Pharmaceutical Resources (0000107197).

I understand that some of the some of files must be recovered from storage. I would, however appreciate there delivery as they become available.

Would you kindly have the appropriate staff person contact me regarding the likely timetable for the copying and delivery.

Sincerely,

Gary J. Aguirre
Senior Attorney
Division of Enforcement
Securities and Exchange Commission
202-942-4675

DJ Orthopedics	DJO	12/22/2003	Shelf Reg.
Emcor Group	EME	10/2/2003	Earnings fall
Cigna	CI	7/11/2003	lowering est.
Aiborne	ABF	3/25/2003	acquisition
AztraZeneca	AZN	11/14/2002	won court case
Pharm Resour.	PRX	10/11/2002	lost court case
Pharm. Resour.	PRX	9/12/2002	raises earnings
Kroger Co.	KR	12/11/2001	Lowered Guid.

From: Aguirre, Gary J.
Sent: Friday, November 12, 2004 6:01 PM
To: larryoleary@nasd.com
Subject: Household International and Rambus files

Larry:

As I mentioned today during our call today, I am requesting the AMEX reproduce and send a complete copy of its file or files relating to the two matters described in the attached spreadsheet.

I am also requesting that this request be interpreted inclusively.

Would you kindly have the appropriate staff person contact me regarding the likely timetable for the copying and delivery.

Sincerely,

Gary J. Aguirre
Senior Attorney
Division of Enforcement
Securities and Exchange Commission
202-942-4675

[redacted]

Rambus	RMBS	1/29/2003	Court ruling
Household Intern.	HI	11/14/2002	acquisition

From: Foster, Hilton
Sent: Wednesday, November 24, 2004 10:45 AM
To: Aguirre, Gary J.
Subject: RE: Trading ranges

Fine by me

From: Aguirre, Gary J.
Sent: Wednesday, November 24, 2004 10:17 AM
To: Foster, Hilton
Subject: Trading ranges

What do you think about relationship between event date and trading ranges? I allowed a little time to see if they dumped after the announcements. Do we need to do this?

Issuer	Event Date	Event Type	Pequot Trading Range
Boston Scientific	7/16/04	Product recall	8/1/03 through 7/31/04
Blue Coat Systems	5/27/04	Earnings	7/1/03 through 6/30/04
DJ Orthopedics, Inc.	12/22/03	Shelf Registration	2/1/03 through 1/31/04
Emcor Group	10/2/02	Earnings	11/1/01 through 10/31/02
Cigna	7/11/03	Earnings	8/1/02 through 7/31/03
Coinstar, Inc.	7/7/03	Customer Loss	8/1/02 through 7/31/03
Elite Information	4/3/03	Tender offer	5/1/02 through 4/30/03
Airborne, Inc.	3/24/03	Acquisition	4/1/02 through 3/31/03
Rambus, Inc.	1/29/03	Court ruling	3/01/02 through 2/28/03
Household Internat'l.	11/14/02	Acquisition	12/1/01 through 11/30/02
Astrazenaca	10/11/02	Court Ruling	11/1/01 through 10/31/02
Pharmaceutical Resources	10/11/02	Court Ruling	11/1/01 through 10/31/02
Pharmaceutical Resources	9/12/02	Earnings	10/1/01 through 9/30/02
Kroger Co.	12/11/01	Earnings	1/1/00 through 12/31/01
Heller Financial	7/30/01	Acquisition	8/1/00 through 7/3/01
Household International	11/14/02	Acquisition	12/1/01 through 11/30/02

From: Aguirre, Gary J.
Sent: Thursday, December 02, 2004 12:19 PM
To: Foster, Hilton
Subject: Can you make the 1 PM meeting?

If so, here's my thoughts:

Since I may more familiar right now with the status of the cases. May it would be better for me to give I will give a quick update on each one. Perhaps better for you to talk about why we think we need to move now on these cases: The Martha Steward approach.

Also, I think Richard may want to hear how we're going to approach the judges.

From: Foster, Hilton
Sent: Tuesday, December 07, 2004 11:44 AM
T : Aguirre, Gary J.
Subject: RE: Pequot: Key decsions today: anything to ad?

I will start putting together a data base of names of insiders

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From: Aguirre, Gary J.
Sent: Tuesday, December 07, 2004 11:43 AM
To: Foster, Hilton
Subject: Pequot: Key decsions today: anything to ad?

1) Scott contact person on IT team
    a) Trading data cleanup and analysis
    b) Assist in electronic data requests, e.g., instant messaging and emails, phone info, trading data

2) Marina: will work with Market Surveillance to bluesheet for PQ options trading in 15 issuers.

3) GJA
    a) Get discovery requests and PQ trading data to Scott
    b) Get info from PQ: Clearing and Prime brokers and Pequot trading names
    c) Try to coordinate discussions with Scott and IT people of issuers and PQ

From: Foster, Hilton
Sent: Wednesday, December 08, 2004 1:13 PM
To: Komblau, David; Kreitman, Mark J.
Cc: Aguirre, Gary J.; Cain, Charles
Subject: Insider trading investigation with possible leak from court personnel

As you know, we have embarked on an insider trading investigation which focuses on trading by a large hedge fund family, Pequot Capital Management, Inc. The funds traded in advance of approximately 15 major news announcements, including announcements of at least two court decisions--one from SDNY and one from the Court of Appeals for the Federal Circuit here in DC.

We will be probing to see whether any of Pequot's traders, analysts or officers (57 have been identified at this time) know any court personnel. Similar inquiries will be addressed to the three issuers, which will likely involve inquiries to over a hundred of their employees regarding contacts with court personnel. One law clerk has already been identified as a possible source. Several large firms have already been retained, e.g., Fried-Frank. If the judges involved in these cases have not already learned of the existence of this investigation, more than likely, they soon will. The only real question is how they will learn. The worst case scenario is that Judge Barbara Jones learns about the investigation when she gets broadsided by a phone call from a newspaper reporter.

I believe that the most professional way for us to proceed is to have Senior enforcement staff meet with the senior judge in SDNY and with the Chief Judge here in DC and explain what is going on.

Tom Newkirk followed this approach a couple of years ago when another insider trading investigation involved a court decision from the Court of Appeals here in DC. The chief judge designated a contact person on his administrative staff, who was quite helpful in responding to our various requests for information. That investigation involved trading by another hedge fund in advance of a decision concerning Eli Lilly. That investigation was ultimately closed without enforcement action.

We can meet on this again if you like, but I wanted to make sure you are aware of my concern that we should contact the court up front, rather than have them find out from another source.

Hilton. 4606.

From: Aguirre, Gary J.
Sent: Wednesday, December 08, 2004 9:44 AM
To: Foster, Hilton
Subject: Things we need to discuss.

Hilton

1) 2 pm call with Blue Coat is a go. I think we might want to discuss how we will handle this with Scott before the call. How about 1:45?
2) Kornblau is the holdup on speaking with judge, not Paul Berger, and Charles says we might want to speak with him directly. Shall we? This is holding contacts with AZN, Par, and Rambus.
3) International Affairs: Do you still have time to speak with them today?
4) Paper files: there starting to come in. Point me in the right direction and I will make the plea for help. Is this ever contracted out?

g

From: Foster, Hilton
Sent: Tuesday, December 14, 2004 8:51 AM
To: Aguirre, Gary J.
Subject: RE: Pequot / IT meeting

ok

From: Aguirre, Gary J.
Sent: Tuesday, December 14, 2004 8:50 AM
To: Foster, Hilton
Subject: RE: Pequot / IT meeting

How about Thursday? I'm going to the NYSE tomorrow. I'll speak with Eric. I think we need to set up schedule to meet each week to see what happened over the past week.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-942-4675
Fax: 202-942-9519
mailto: aguirreg@sec.gov

From: Foster, Hilton
Sent: Tuesday, December 14, 2004 8:47 AM
T : Aguirre, Gary J.
Subject: Pequot / IT meeting

I would like to meet with our IT people again later this week. I will work up a list of points such as

1. Current status of bluesheets
   For each security:
   Time frame
   # of records received

   Need to automatically resubmit request ltr

   Data integrity issues

2. Business objects
   Describe the slice/dice that is contemplated
   Provide HF & GA with access to master data base of blue sheet files

3. Summary of other electronic data requested/received
   Names, locations of all files
   Back up procedures ok?

4. Other issues

From: Foster, Hilton
Sent: Tuesday, January 18, 2005 7:54 AM
To: Aguirre, Gary J.
Subject: RE: Heller Financial, Coinstar, Airborne

I've looked at the Coinstar files. Not much there. I will talk to Charles today

-----Original Message-----
From: Aguirre, Gary J.
Sent: Saturday, January 15, 2005 10:09 AM
To: Foster, Hilton
Subject: Heller Financial, Coinstar, Airborne

Hilton:

Just a reminder that you would be taking a look at these files from former cases.

You have the Heller files and I gave you the ID info on the staff person that handled Coinstar. Charles worked on Airborne and should know where the files are.

I'm not so sure about Coinstar, but Heller and Airborne both look interesting.

Gary

From: Foster, Hilton
Sent: Monday, January 31, 2005 3:53 PM
To: Aguirre, Gary J.
Subject: RE: Peqout: OEA screening

Segment investing. That is, is the suspect investment made in an industry group that Pequot rarely trades in?

From: Aguirre, Gary J.
Sent: Monday, January 31, 2005 3:51 PM
To: Foster, Hilton; Ribelin, Eric
Subject: Peqout: OEA screening

Here are some factors I'm going to discuss with Andy to screen for more suspected insider trading using factors below. Suggestions?

1) Sudden change (e.g. ceased buying and heavy selling, maybe be combined with shorting) or initiate new position;
2) Consistent and steady trading (shorts combined with sales are consistent; shorts combined with longs are not);
3) Same funds involved, e.g., Pequot Scout. We're still interested even though other funds may have been trading in opposite direction, e.g., Pequot International selling when Scout is buying;
4) Favorable and sharp price move, e.g., price drop if shorting, price increase if buying.
5) Sizable accumulation or liquidation of position measured in dollar value of position, e.g., minimum $5 million.

Gary

From: Foster, Hilton
Sent: Monday, February 07, 2005 12:56 PM
To: Aguirre, Gary J.
Subject: 15 feb

Our office of International Affairs has asked me to be a video program on 15Feb for Department of State which is working with India on an insider trading program. I told them I will reserve the date. If this conflicts with Pequot testimony let me know asap .

Hilton

From: Aguirre, Gary J.
Sent: Wednesday, February 09, 2005 10:41 AM
To: Foster, Hilton; Ribelin, Eric
Subject: Broadview subpoena-

Please check it out.

Will go out at noon

From: Aguirre, Gary J.
Sent: Monday, February 14, 2005 1:25 PM
T : Foster, Hilton
Subject: RE: Pequot Ex-CEO

I'm sending out subpoenas. Could you come up for a minute to discuss taking testimony?

From: Foster, Hilton
Sent: Monday, February 14, 2005 1:26 PM
To: Aguirre, Gary J.
Subject: RE: Pequot Ex-CEO

I agree

From: Aguirre, Gary J.
Sent: Monday, February 14, 2005 10:14 AM
To: Ribelin, Eric; Foster, Hilton
Cc: Kreitman, Mark J.
Subject: Pequot Ex-CEO

Eric and Hilton:

Here's a news clip re an ex-employee who we should try to speak with.

Gary

"Sharon Haugh, **chief** executive officer of **Pequot Capital** Management Inc., Westport, Conn., left by "mutual agreement," said Jonathan Gasthalter, Pequot spokesman. Ms. Haugh did not return phone calls by press time to comment on her departure and plans. Ms. Haugh had been at the hedge fund firm for about a year. Art Samburg, Pequot's chairman and founder, has assumed Ms. Haugh's responsibilities; she will not be replaced."

From: Aguirre, Gary J.
Sent: Monday, February 14, 2005 5:02 PM
To: Foster, Hilton
Subject: Pequot emails

Pequot first batch of emails just came in. Maybe Jason can speed up getting them on Iconnet.

From: Aguirre, Gary J.
Sent: Friday, February 18, 2005 9:45 AM
To: Foster, Hilton
Subject: Pequot

Hilton:

Attached are the subpoenas, attachments, and covers on each of the PQ players below, except for the cover on Cope. Let's discuss at 2:30. Also, let's go over the phone company situation.

Gary

From: Aguirre, Gary J.
Sent: Tuesday, March 01, 2005 1:05 AM
To: Hanson, Robert; Ribelin, Eric; Foster, Hilton
Cc: Kreitman, Mark J.
Subject: A revised investigative plan for Pequot.

The plan we had going into the telephone conference on February 18 with Pequot has been fully frustrated by its tactics. FF's has now played a trump card--all witnesses need their own counsel--to buy more delay. For strategic reasons, I think we should grumble about this tactic but allow the exam dates to slip. Further, I think we should send out the second set of subpoenas, which are ready to go, for the other Pequot employees who were involved in the trading decisions or had contacts with the issuers. They will obviously grumble about these subpoenas and want time to bring in counsel to represent each individual. I think we should let the exam dates slip as well.

I think our strategy should focus on getting Pequot's e-mails from all sources--both internal and external. The conference call today should be directed at clearing any obstacles to getting the internal e-mails. Those should include the following:

1) The e-mails for the specified periods and individuals in Appendix B to the 2/7 subpoena. This should also include double deleted e-mails or a search through all e-mails for the relevant time periods for copies.

2) It should include all e-mails relating to items 10-14 below. This will likely involve key word searches through all e-mails for the relevant time period.

3) We should also let them know that we are send a second subpoena for the remainder of the e-mails sought by our 11/24 letter. I told KH this was coming so it should be no surprise.

The key to moving ahead with this strategy is to get some straight answers from Onsite today regarding what they were asked to do and how far they have progressed.

Regarding external e-mails, I believe this is Pequot's greatest fear. Broadview poses a great risk for Pequot since Broadview may not deep-six the e-mails which got lost in Pequot's "double deletes" or otherwise. We should of course get these e-mails from the rest of the issuers, some of which we have or are getting. I think we should also serve subpoenas on key broker-dealers, such as Goldman and Morgan Stanley, whose ties to Pequot propitious timing seem to be frequent.

Gary

Appendix B

Name	Period
Navroze Alphonse	11/1/02 through 10/31/03
Joe Batcha	7/1/03 through 6/30/04
Mark Broach	1/1/2001 through 12/31/2003
Jeremy Chase	2/1/03 through 1/31/04
Paul Farrell	5/1/03 through 4/30/03
Josh Fisher	1/1/02 through 10/31/02
Faraz Naqvi	2/1/2002 through 1/31/03

Steve Orlov 9/1/03 through 5/30/04
James Patricelli 2/1/02 through 1/31/03
Arthur Samberg 1/1/01 through 12/31/03
Gregory Rossman 9/1/02 through 5/30/03

11. All minutes, notes or documents, relating to any meeting between any agent, officer or employee of Pequot and any agent, officer or employee of any of the fourteen issuers specified below in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C;
12. All written communications between any agent, officer or employee of Pequot and any agent, officer or employee of any of the fourteen issuers specified below in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C;
13. Any note, report or analysis prepared by any Pequot analyst relating to any of the fourteen issuers specified below in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C;
14. Any note, report, analysis or other document considered by the trader, account manager or any other person who participated or was otherwise involved in the decision to trade in the securities of the fourteen issuers specified in Appendix C which document was prepared, circulated or generated during the specified trading period for each such issuer on Appendix C;

From: Hanson, Robert
Sent: Friday, August 26, 2005 11:57 AM
To: Aguirre, Gary J.
Cc: Jama, Liban A.
Subject: RE:

Seems pretty straight forward. Thought we would keep the ball rolling while you were away.

From: Aguirre, Gary J.
Sent: Friday, August 26, 2005 10:42 AM
To: Hanson, Robert
Subject: RE:

Appreciated, but I'm not sure were on the same wave length. There is no issue about whether to return the e-mails. It's also explicitly covered by our agreement with FF. I intended to do it myself before I left, but overlooked it the last night before vacation. Thus, it did not get done and did not go on the Jim-Liban list. I recalled it when I checked my voice mails yesterday and had a message from On Site on a different subject.

I suggested that I do it when I get back because I'm not 100% sure exactly what needs to be done. If they are just on On Site, which is how I recall the FF letter, that will just require that you get the bates stamp numbers from the FF letter or Kevin Harnisch and send a letter to On Site. If they were also produced by CD, as they usually are, you will have to identify the CD, which will be among hundreds in my office on one of my working areas or in one of the boxes containing CDs. That may not be easy to do. I have not sent those CD's to IT to avoid unnecessary duplication; Liban knows the details.

Since we are dealing with 10 e-mails out of 4,000,000, I thought it could wait till I got back. But it's obviously your call.

From: Hanson, Robert
Sent: Friday, August 26, 2005 8:47 AM
To: Aguirre, Gary J.
Subject: RE:

Since we have a clear Division policy for such a situation (return the documents), Liban and I plan to call Kevin to resolve.

From: Aguirre, Gary J.
Sent: Thursday, August 25, 2005 2:34 PM
To: Jama, Liban A.
Cc: Eichner, Jim; Hanson, Robert
Subject:

Liban:

There was another item that should have been added to the list I gave to Liban and Jim before I left. Audrey has notified us that they inadvertently produced certain documents

which they believe are subject to the attorney-client privilege. They have asked that we effective return those documents by telling OnSite to remove them from our database. I intended to take care of this when I got back, but did not tell Audrey or Kevin that there would be a delay. Maybe somebody can just let them know that it will be addressed soon.

Gary

From: Aguirre, Gary J.
Sent: Tuesday, February 15, 2005 9:45 AM
To: Ribelin, Eric; Foster, Hilton; Williams, Constance; Conroy, Thomas; Ivarone, Jason
Cc: Kreitman, Mark J.; Hanson, Robert
Subject: Pequot email production

In 12 weeks, we've got 1/2 of 1% of the e-mails Pequot was requested and now subpoenaed to produce. At this rate, we have only 48 years to go. Hmmm, do these guys have something to hide?

Scott and Jason: When can we get the 2000 on Iconnect?

Eric, Hilton and Tom: Anybody have time to begin looking at these? If so, are they relevant by time frame (during trading periods before announcements) and subject (issuers in investigation) or are they just more fill like the research documents?

Connstance: we'll fill you in at the meeting.

Let's discuss tomorrow.

Gary

From: Aguirre, Gary J.
Sent: Wednesday, May 11, 2005 12:50 PM
T : Kreitman, Mark J.; Hanson, Robert; ORourke, Kevin
Cc: Ribelin, Eric; Foster, Hilton
Subject: Fried Frank concession?

Audrey told me they are ready to discuss using search terms (attorney's names) to ID possible attorney attorney-client documents, with our agreement to return any privileged documents inadvertently produced.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-942-9519
mailto: aguirreg@sec.gov

From: Aguirre, Gary J.
Sent: Wednesday, May 11, 2005 7:35 AM
To: Kreitman, Mark J.; Hanson, Robert; ORourke, Kevin
Subject: Re: Undoing six weeks of work or "unrolling the toothpaste tube"

Over the last six weeks, I have tried to develop and implement tactics to bring integrity to the Fried Frank's e-mail production. The process lacked integrity because it was dependent upon Fried Frank's integrity. From my experience in this case, and from what others have told me, we cannot rely on Fried Frank's integrity as the corner stone of our investigation.

I have used a metaphor and an equation to describe this tactical approach. The metaphor is "rolling up the toothpaste tube." I am in the process of tracking each step Fried Frank went through: from selecting the backup tapes, the delivery of backup tapes to On Site, On Site's delivery of e-mails to Fried Frank, and Fried Frank's delivery of e-mails and a privilege log to us. In words, the number of e-mails that went into Fried Frank should equal the number coming out (delivered to us) plus the number on Fried Frank's privilege log. This is a very simple equation: X (total e-mails delivered to Fried Frank) = Y (e-mails produced) + Z (e-mails described in privileged log).

Yesterday, we discussed whether we should negotiate to have Fried Frank's vendor conduct the searches. If we are able to do so, the equation above will be in place and it will bring integrity to Fried Frank's production of e-mails. On the other hand, if Fried Frank does the search, the equation vanishes.

Nor do I believe that Paul will authorize us to serve a subpoena and take testimony from Fried Frank attorneys and their assistants. I doubt that we would ever be able to establish cause to take such testimony.

I also think Fried Frank's letter has effectively raised this issue.

Finally, while I understand Kevin's concerns about telling Fried Frank how to respond to our subpoena, I think those concerns are dwarfed by the reality that Fried Frank will find ways to deep six helpful (I'm not assuming any "smoking guns") e-mails or indefinitely delay the production of such documents.

Finally, Fried Frank knows exactly what I am trying to do and they are trying to block it every way they can. Audrey and especially Anello continuously tried to block my questions at the Patel exam or told Patel what to say in countless off the record consultations (whispering in his ear). Now Audrey is trying to block us from getting the documents from On Site through a baseless objection. I suspect she is telling On Site what she told us: You (On Site) signed a confidentiality agreement with us (Fried Frank) that you are about to violate.

From: Hanson, Robert
Sent: Wednesday, May 11, 2005 12:55 PM
To: Aguirre, Gary J.
Subject: Re: Fried Frank concession?

Good. What's your take

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Kreitman, Mark J. <KreitmanM@SEC.GOV>; Hanson, Robert <HansonR@SEC.GOV>; ORourke, Kevin <ORourkeK@SEC.GOV>
CC: Ribelin, Eric <RibelinE@SEC.GOV>; Foster, Hilton <FosterH@SEC.GOV>
Sent: Wed May 11 12:54:06 2005
Subject: Fried Frank concession?

Audrey told me they are ready to discuss using search terms (attorney's names) to ID possible attorney attorney-client documents, with our agreement to return any privileged documents inadvertently produced.

Gary J. Aguirre

Senior Counsel

Division of Enforcement

Securities and Exchange Commission

Phone: 202-551-4437

Fax: 202-942-9519

mailto: aguirreg@sec.gov

From: Hanson, Robert
Sent: Wednesday, May 25, 2005 2:24 PM
T : Aguirre, Gary J.
Subject: RE: PQ urgent

Come on by

From: Aguirre, Gary J.
Sent: Wednesday, May 25, 2005 2:20 PM
To: Hanson, Robert
Subject: PQ urgent

Please see me re some of the changes.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-942-9519
mailto: aguirreg@sec.gov

From: Florschutz, Lesley
Sent: Monday, May 23, 2005 12:34 PM
To: Aguirre, Gary J.
Subject: RE: Paralegal request
Importance: High

Gary: Remember you need to provide me a memo from your Associate. What you wrote in your memo was good, it just needs to come from your Associate.
The sooner you get me the memo, the sooner it will (hopefully) be approved and we can start getting you resumes and get some interviews set up.

I need to get together all lit support requests in for mid-year budget purposes, if nothing else. David Kornblau sent out an email yesterday reminding staff that we need all requests in by no later than COB this coming Friday.

I'm just reminding you, so please let me know and thanks! /Lesley
-----Original Message-----
From: Aguirre, Gary J.
Sent: Monday, May 09, 2005 5:29 PM
To: Florschutz, Lesley
Subject: Paralegal request

It's attached.

Sorry.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-942-9519
mailto: aguirreg@sec.gov

From: Aguirre, Gary J.
Sent: Thursday, July 28, 2005 6:58 AM
To: Hanson, Robert; Jama, Liban A.; Ribelin, Eric; Eichner, Jim
Subject: Developing other possible GE-HF tippers

I circulated my June 28 memo yesterday to Jim and Liban, but later remembered that it explicitly assumes knowledge of my June 27 memo. I am therefore attaching that memo. I also thought I should put Eric and Bob on the recipient's list, so I am attaching both memos to this e-mail.

Following up on the discussion yesterday, I am also attaching the part of the Samberg exam where I asked him about his acquaintances at Morgan Stanley in 2001, to be distinguished from the questions about his contacts with anyone at MS who had any involvement in the acquisition. Like John Mack, most of these people are fairly prominent, e.g., Byron Wien. I did not run thorough searches on Onsite's or our databases for those on Samberg's Morgan Stanley acquaintance list. Although I have my doubts from my review of Samberg's e-mails, it is conceivably possible to develop the facts suggesting a possible tipper: trust relationship with Samberg, possible access to info, contacts with Samberg at key times, and motive to pass along tip.

However, if you get that far, there will remain another obstacle as I understand our current thinking--establishing evidence that the person "went over the wall" before you can take his or her exam. I suspect that will not be easy to do.

From: Hanson, Robert
Sent: Friday, August 05, 2005 11:17 AM
To: Aguirre, Gary J.
Subject: RE: Mack testimony

Gary,

I forwared this to Paul and Mark to review. I think we should meet after some of the facts in the memo are nailed down to discuss whether it makes sense to go forward. See you in a couple of weeks.

Bob

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:34 PM
To: Hanson, Robert
Subject: Mack testimony

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information

The first element is whether Mack had possible access to information that GE would make a tender offer for HF. He had access from two sources: he had been the CEO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time. Also, CSFB was "wooing" Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or CS to mention, as part of this wooing process, what inventory Mack would be taking over. Incidentally, we know how Samberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the

possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HF during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team as Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller.

a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million info Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "busting his chops" Samberg's chops because he had not got the documents on this investment. Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million

lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) *Board seats* As shown on one of the spreadsheets, Samberg was promoting Mack for board seats on both Baby C and Fresh-start.
c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.
d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."
e) *Friendship* Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo.
f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Samberg had a relationship of trust deep friendship with Mack.

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend.

In July 2001, Samberg's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was

looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and ***I did things in a manner that was expedient at the time given my expertise in this area.***

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. ***Times were fragile.*** I needed their approval to do whatever I wanted to do ***or they might walk*** (emphasis added).

There do not appear to be other leads in the Samberg e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Samberg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Samberg's circles.

Gary

Evaluation of Gary Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chef, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

MEMORANDUM

VIA: Federal Express, Certified and First Class Mail

TO: Gary J. Aguirre

FROM: Linda Chatman Thomsen
Director, Division of Enforcement

DATE: September 1, 2005

SUBJECT: Notice of Termination During Trial Period

This is to inform you that your employment as a General Attorney (SI), Enforcement Division, will be terminated during your trial period based upon your demonstrated inability to work effectively with other staff members and your unwillingness to operate within the Securities and Exchange Commission (SEC) process. Your termination from the SEC and from the Federal service will be effective at the close of business on Friday September 2, 2005.

You began your employment with the Commission on September 7, 2004. As you were advised at the time of your appointment, an employee who is given a career conditional appointment, as you were, must serve a one-year trial period. It is during this time that an employee has to demonstrate fully his/her qualifications for continued employment.

Several times throughout your trial period, your supervisors advised you that your conduct was inappropriate. You were permitted to transfer from one Assistant Director group to another after assuring your Associate Director that problems that had occurred, including personality conflicts and resistance to standard supervision, would not recur. However, you have continued to have conflicts with other staff attorneys, your branch chief, and a Trial Unit attorney assigned to your primary case responsibility. You have continually expressed dissatisfaction with the supervisory structure and ignored the chain of command in the Division. On one occasion, you submitted (and later withdrew) your resignation to your Associate Director, and indicated that you were uninterested in participating in preparation of your primary case assignment beyond its investigatory stage. While your substantive work generally has been good, the problems that have occurred in other areas are so significant that they far outweigh the value of that work.

During the last several months, your Associate Director, your Assistant Director, and your branch chief have met with you on several occasions to explain to you the importance of working together with other staff members to achieve consensual goals and the importance of operating within the SEC process.

Since those meetings, your conduct has not improved to the level that warrants retention beyond your trial period. Therefore, your employment with the SEC will be terminated during your trial period, effective September 2, 2005 at 5:00 p.m., in accordance with the provisions of 5 CFR 315.804.

I have reviewed the situation with your supervisors, and this decision represents the consensus reached among them. You may appeal this action to the Merit Systems Protection Board (MSPB) only if you believe it was based on partisan political reasons or marital status. Any such appeal must be submitted in writing, not later than thirty days after the effective date of this action, to the Merit Systems Protection Board, Washington, D.C. Regional Office, 1800 Diagonal Road, Suite 205 Alexandria, VA 22314-2480; e-mail: washingtonregion@mspb.gov.; Fax: (703) 756-7112. Appeal forms are attached. You can access the relevant regulations at www.mspb.gov.

If you have any questions about this notice or your rights, please contact Linda Borostovik, Human Resources Specialist, at 202-551-7871. Although she may not represent you, Ms. Borostovik is available to answer questions you may have regarding your attendant rights. In addition, we need to coordinate your obtaining personal items from Station Place and returning your laptop, token, identification badge, and office key. You may contact Chuck Staiger at 202-551-4990 to arrange to come into the office for your personal belongings and the return of Commission items or to use a courier service for this purpose.

Attachment: MSPB Appeal Forms

From: Kreitman, Mark J.
Sent: Tuesday, February 22, 2005 3:23 PM
To: Foster, Hilton
Cc: Aguirre, Gary J.; Ribelin, Eric; Hanson, Robert
Subject: RE: Pequot--Prem Lochman

Thanks, Hilton.
That helps.
If we can interest the Southern District again, that should be a very high priority.
Mark

-----Original Message-----
From: Foster, Hilton
Sent: Tuesday, February 22, 2005 3:21 PM
To: Kreitman, Mark J.
Cc: Aguirre, Gary J.; Ribelin, Eric
Subject: RE: Pequot--Prem Lochman

Gary is basically saying that it probably won't be very productive to talk to Lachman at this time since Lachman is aware of the authorities' interest in his possible involvement in illegal trading or tipping.

I think Gary agrees with me that a good way to 'squeeze' or put pressure on Lachman is to get some important evidence on him from a review of his phone records or thru other means.

As I understand it, SDNY put the inquiry on hold because the SDNY did not have any securities trading to look at. If we can work backwards from Pequot's trading and connect it, directly or indirectly to Lachman, then we might have something to run with.

When Gary says that Lachman's credibility is zero, Gary is not saying that he believes that Lachman did not pass the tip or rumour. He is saying that Lachman backed off his story because Lachman thought that his purported tippee talked to the authorities and was thereafter wearing a wire.

Hilton

-----Original Message-----

From: Kreitman, Mark J.
Sent: Tuesday, February 22, 2005 3:11 PM
To: Hanson, Robert
Cc: Foster, Hilton; Ribelin, Eric
Subject: RE: Pequot--Prem Lochman

Don't follow this.
Can someone help me out?

-----Original Message-----
From: Aguirre, Gary J.
Sent: Tuesday, February 22, 2005 6:41 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Foster, Hilton; Ribelin, Eric; Aguirre, Gary J.
Subject: Pequot--Prem Lochman

Robert:

Since Lochman offered one story and then withdrew it, his credibility is zero. However, I think the issue runs deeper than that.

Here's my thinking why its worth taking a look at Lochman. First, it is likely that Lochman told Par's CEO the bribe story. Why else would Par pay for Kirkpatrick & Lockhart to go to the NYSE, FBI and US Atty?

So why would Lochman recant the bribe story? During the initial conversations, Par's CEO asked Lochman about the source of his information. According to K&L's notes, Lochman said he would only reveal the source in a face to face meeting provided Par's CEO swore he was not wearing a wire.

Three months later, the Par CEO contacts Lochman to inquire again about the source. Lochman, former pharm analyst and head of hedge fund, did not take the bait.

But he made have some other motivaton for the bribe story

I expect to get a better handle on this during March when I see the 302s.

I am also interested in seeing what Lochman's phone records produce.

Gary

Bvc From: Kreitman, Mark J.
Sent: Monday, July 25, 2005 7:15 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert
Subject: RE: Mack and CSFB subpeonas

I need greater specificity than the information provided here. Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall, is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view. The contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational. The fact that we have not identified other potential tippers is of only marginal significance. Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. The evidence of motive you cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. I have clarified the role of Irv and Larry, which should assuage your anxiety to some degree. I have at no time "denied [your] my request to proceed with the CSFB . . . subpoena." To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the sine qua non for focused investigation of Mack.

From: Aguirre, Gary J.
Sent: Thursday, June 30, 2005 9:29 AM
To: Kreitman, Mark J.
Subject: FW: Mack and CSFB subpeonas

Corrected e-mail sent yesterday

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

From: Aguirre, Gary J.
Sent: Wednesday, June 29, 2005 5:11 PM
To: Kreitman, Mark J.
Subject: Mack and CSFB subpeonas

Mark:

As you know, I have asked to issue a subpoena to CSFB and to take the testimony of John Mack in connection with Samberg's $80 million trades in GE and Heller shortly before the public announcement of the GE's acquisition of Heller. I suggested in my e-mail to you of June 27 in summary fashion why Mack was a logical source of the tip and also suggested in my memo of June 28 that this was the next logical step in this investigation.

The reasons are the following:

1) Mack had access to this information from two sources, since he had recently left Morgan Stanley, which represented GE, and moved to CSFB, which represented Heller;
2) Mack had communications with Samberg on at least two critical times during the Samberg's trading, including a call after the close on the Friday before the Monday when Mack began trading; we have no other leads at this time of people who likely knew of the acquisition that had contact with Samberg shortly before he began trading;
3) I have questioned Samberg about all individuals who were identified in chronologies who had knowledge before July 2, 2001 of the Heller acquisition, and Samberg denies he had contacts with any of them; this suggests that the tipper was not directly involved in the acquisition;
4) Samberg would likely have a relationship of trust with the person from whom he accepted the information, Mack meets that criteria,
5) There were a number of motives for Mack to pass this information along to Samberg:
    a) Mack was admitted directly into Pequot deals, e.g., the night that Mack is suspected of giving Samberg the tip, Samberg arranged for Mack to get a $5 million piece of a Lucent investment subsidiary that was being sold at a fire sale;
    b) Mack got to put at least $7 million (likely much higher) into Pequot funds that were closed; these funds had sensational returns at that time, including $5 million into one of the funds that was allocated 5.4 million in profits from GE-HF;
    c) Samberg was proposing Mack as a director on two boards;
    d) They were very close friends, e.g., Samberg's secretary says "Mack loves you"; Samberg was in desperate need at that time for some big hits, since his all star protégé was leaving about half of Pequot employees and Samberg was worried that more would leave;
    e) Mack solicited and obtained Samberg's stock tips;

f) Other consideration that does not show up in the Pequot e-mails.

Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation. First, Bob has instructed me to stock with the GE-Heller investigation. The Samberg-Microsoft investigation is on hold until David Anders and the FBI speak with David Zilkha. That matter really depends on whether Zilkha tells the FBI that he tipped Samberg around April 9. If he does, David Anders will likely continue the matter as a criminal investigation. If Zilkha does not admit he tipped Samberg, we would have the same problem.

As I mentioned in my June 28 memo, the second best source of proving the Samberg GE tip is from the backup tapes. I am not permitted to speak with either Pollack or Storch, who are handling this matter and Audrey refers me to them. That effectively closed off this source. The other possibility is to take extensive testimony from Pequot employees in this regard. I have already taken five examinations trying to pin down this issue. Further, taking two weeks of testimony on this issue that may not be productive is not how I interpret Bob's guidelines.

I have proposed that we obtain the documents from CSFB that would show when Mack obtained information about GE-HF. I suspect that Mack learned during an orientation at CSFB. I would be looking for information that Mack knew about GE-Heller as well as information when Mack learned. Evidence that Mack learned near or on Friday June 29, the night of his call to Samberg, would tend to focus the matter more on Mack. Evidence that he did not learn until July 3 or never learned would eliminate him. From the newspaper accounts, I have inferred that there were some arrangements between CSFB [prior draft erroneously referred to Morgan Stanley] and John Mack in early June. This is consistent with an orientation later in the month during which Mack learned about the GE-HF matter, perhaps 10 days to 2 weeks before the public announcement that he was Morgan Stanley's CEO.

I understand you have denied my request to proceed with the CSFB and Mack subpoenas

Gary

From: Aguirre, Gary J.
Sent: Tuesday, November 02, 2004 4:56 PM
To: Grime, Richard; Cain, Charles; Foster, Hilton
Subject: Pequot

Meeting set for tomorrow at 9 am at Richard's office to discuss investigation on above.

From: Aguirre, Gary J.
Sent: Wednesday, November 03, 2004 10:59 AM
To: Grime, Richard; Cain, Charles; Foster, Hilton
Subject: Pequot short term invsetgation

Following up on our meeting today, I have outlined the investigative steps that I will take on the short term pending Hilton's preparation of a more comprehensive plan. If I've missed any nuggets, please let me know. Also, what do each of you think about points D ?

A) In general.
    1) Finalize action memo
    2) Blue sheet all market on each referred matter
    3) Double check with SROs to get complete files on referrals (Hilton: I want to discuss with you what more the SRO's customarily have in addition to the referral).
    4) Options
        a) Check with each SRO for options trading
        b) Check with each options exchange on same (is this feasible?)

B) Pequot
    1) Request list of employees and investors
    2) Preserve records
        a) Relevant data on each trade, including Technical, fundamental and all other research.
        b) Include telephone invoices, cancelled checks and statements

C) Issuers
    1) Chronology requests
    2) Name recognition letter
    3) Preserve records relating to transaction

D) Contact foreign exchanges: Should we inquire through the Office of International Affairs whether any major foreign exchange has identified suspicious PQ trades?

E) Peter Simonyi is working on his analysis of PQ trading blotter for other suspicious trades. If this is done soon, I will review, check news and circulate new candidates for possible inclusion in Section C above.

Peter: Shall I bring you up another referral that came in yesterday? Maybe we can discuss point A-3. Got a few minutes?

From: Aguirre, Gary J.
Sent: Thursday, August 25, 2005 2:25 PM
T : Hanson, Robert; Jama, Liban A.; Eichner, Jim
Cc: Ribelin, Eric
Subject: RE: Pequot to do list

Bob:

I sent an e-mail to Liban and Jim identifying the ongoing tasks that need to be monitored in my absence. As you suggest, I will do a more detailed memo in response to your e-mail this morning when I get back. But there is one new item that needs attention between now and September 6, when I get back. It arose as a consequence of input from Storch yesterday. I did a lengthy memo, but it is not ready for circulation. The bottom line: we are in the process of receiving a huge number of new e-mails from Pequot. Those relevant to Samberg should be retrieved from the incoming CD's and put in a new folder, so they can be reviewed before his next exam. .

Storch's explanation. There are no missing backup tapes, just poor organization by Pequot. Storch believes that all of the backup tapes for all time periods and locations are among the 600 that have already been delivered to OnSite. If you do the math, we have obtained e-mails from approximately 200 tapes, monthly tapes for four exchange servers for four different locations for periods up to 48 months. According to Storch, the other 400 or more tapes may yield relevant e-mails. On his instructions, On Site had all 600 tapes processed by the software Pequot used during the 2001-2004 period to yield "catalogues," a term of art. A catalogue describes the contents of each backup tape, much like a table of contents does for a book. As a consequence, OnSite is discovering huge numbers of relevant e-mails, e.g., 200,000 last week.

This is consistent with a puzzling letter I recently received from Fried Frank in which they indicated that additional Samberg e-mails were being produced, without, as I recall, identifying the time period. I believe this CD and cover letter were among those that I gave to Liban to go to IT to be put on our Pequot database (In general, I have stopped adding PQ CDs to our database, because we will obtain a hard drive from On Site with all e-mails in September or October).

In addition to these Samberg e-mails, it is very possible that we may receive other Samberg e-mails as the Storch process above continues. I suggest that the Samberg e-mails be extracted from the CDs, the one I gave Liban and any new ones, and be put in a new Samberg e-mail folder. This will make searching them simpler. (Liban: if this is not clear to you, please e-mail me with any questions or a time that we can talk).

The Pequot shift raises a number of questions. Here are some: Is Storch's theory reconcilable against the Pekin theory tapes are missing? How did Storch decide only 600 of 2000 tapes contain relevant documents? How did he identify them? How much is Storch relying on Pequot input? I think it would make more sense to sit down with the IT guys, maybe Jason Ivarone and Scott Plimpton, and sort out this new input and bring them into the next discussion.

In any case, I believe this is a positive development. It will take a couple more sessions with Storch to clarify the big picture. However, I think we can use Storch and his firm to get the relevant e-mails, using the integrity gap as the lever, in much the same way as Judge Sporkin was the lever to obtain 3.6 million e-mails from Audrey in May.

Gary

From: Hanson, Robert
Sent: Thursday, August 25, 2005 11:37 AM
To: Jama, Liban A.; Eichner, Jim; Aguirre, Gary J.
Subject: Pequot to do list

Please provide me with suggestions of tasks to be completed that should go on a master list on the Pequot case. Gary, I included you, but you don't need to respond until you return. I'd like to get started on this process in the meantime.

Thanks,

bob

August 6, 2005

Dear Gary,

I enjoyed working with you this summer. Thanks for making my experience such a rewarding one.

Best,
Nancy

~~Nancy~~ Miller
2747 Bradshaw Rd.
Sacramento CA
95827

ZIP [redacted]

4624

Mr. Gary Aguirre
SEC
100 F St. NE
Washington DC 20549
~~20002~~

From: Ribelin, Eric
Sent: Wednesday, May 04, 2005 12:23 PM
To: Aguirre, Gary J.
Subject: FW:

Fyi.

-----Original Message-----
From: Ribelin, Eric
Sent: Wednesday, May 04, 2005 12:05 PM
To: Hanson, Robert; Kreitman, Mark J.
Subject: RE:

Bob, I'm bringing Craig Miller onboard next week, but we still need another attorney. For example, we need to start conducting phone interviews and Gary simply doesn't have the time to review documents, prepare for testimony, conduct testimony and sit in on phone interviews. I'm comfortable doing interviews myself, but I think it's always advisable to have a lawyer present. According to Fried Frank's letter of April 29, they have spent over 10,500 hours on the matter. They have 20 lawyers (five partners and 15 associates) working on the matter and 35 contract lawyers working 10 hours per day, six days a week. We now have a story about the cross trades in the IPO after markets that we need to track down. My preference would be to get a subpoena out today to Pequot and to their executing brokers, but it is difficult with Gary in New York reviewing documents that were dumped on him (again at the last minute) for testimony tomorrow. Without the additional resources now, we will be greatly hampered going forward. Thanks. Eric.

-----Original Message-----
From: Hanson, Robert
Sent: Wednesday, May 04, 2005 8:17 AM
To: Ribelin, Eric; Kreitman, Mark J.
Subject: RE:

Thanks for the information Eric. Is it getting through documents or something else? Anyone else from your shop interested?

-----Original Message-----
From: Ribelin, Eric
Sent: Tuesday, May 03, 2005 8:38 PM
To: Kreitman, Mark J.; Hanson, Robert
Subject:

Guys, it's my strong belief that gary needs the assistance of another attorney. Hilton is on his way out fast and gary is absolutely swarmmed under. if you could find someone who is smart, willing and able (difficult to find all three these days) it would be of trmendous help. Even someone new (even if a bit green) would fit the bill. The investment will be a good one. Thanks.

Sent from my BlackBerry Wireless Handheld

From: Aguirre, Gary J.
Sent: Wednesday, May 11, 2005 9:11 AM
To: Hanson, Robert
Subject: RE: HO 9818

OK

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-942-9519
mailto: aguirreg@sec.gov

-----Original Message-----
From: Hanson, Robert
Sent: Wednesday, May 11, 2005 8:46 AM
To: Aguirre, Gary J.
Subject: Re: HO 9818

I think iit probably makes sense for jim to work on discrete transactions. I think ge is by far the best case I've heard but I don't know about elite. My sense is that he is a very good attorney with excellent judgment. If you can wait a day to talk some more, I'll be back tomorrow.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Hanson, Robert <HansonR@SEC.GOV>
Sent: Wed May 11 08:14:38 2005
Subject: HO 9818

I spoke with Jim about possible assignments and I think he would like to take a particular issuer transaction and run with it, possibly Elite Info. This may be our strongest matter. Testimony need to be taken from Broadview, Elite's consultant, and two Pequot witnesses. Lots of hard copy and eltronic documents to review from Broadview and Pequit. What do you think?

Also, how will we handle contacts and correspondence with Pequot? My suggestion: limmit Jim's contacts to scheduling so we don't have Fried Frank trying to exploit his newness to the case.

From: Eichner, Jim
Sent: Friday, June 03, 2005 3:56 PM
To: Kreitman, Mark J.; Aguirre, Gary J.
Cc: Hanson, Robert; Eichner, Jim
Subject: RE: Pequot: privilege issue re backup tapes

Mark-

I did some quick research on the issue of whether Pequot can assert attorney-client privilege with regard to Pequot tapes that are now in the possession of Andor. The analysis depends on the circumstances under which Andor split off from Pequot and under which Andor came to have possession of the tapes.

The basic rule is that the ability to assert or waive a company's privilege flows with control of the company. So new managers at a company installed as a result of a takeover, merger, or just normal succession can assert or waive the privilege. See In re: Grand Jury Subpoenas, 902 F.2d 244 (4th Cir. 1990). However, when a company's confidential attorney-client communications are transferred through a transfer of assets, without a transfer in control of the company, the privilege is waived as to those communications. In re: In-Store Advertising Securities Litigation, 163 F.R.D. 452 (S.D.N.Y. 1995). In addition, a parent company waives its privilege with respect to documents it leaves in the hand of a subsidiary after it sells that subsidiary. Robbins & Myers, Inc. v. J.M. Huber Corp., 2003 WL 21384304 (W.D.N.Y. May 9, 2003).

Because Andor does not control Pequot, but has possession of the tapes, it appears that the transfer would have waived Pequot's privilege with regard to the tapes. There would also be waiver of the privilege if there was no affirmative transfer, but Pequot merely left the tapes in the hands or Andor when it split off. However, because we do not know the precise circumstances through which Andor came to possess the tapes, it is hard to give a conclusive answer about whether there is any basis for Pequot to continue to assert privilege.

As we get more information about the precise circumstances of the transfer, I will see if I can find any caselaw more on point.

Jim

cc: Bob, Gary

-----Original Message-----
From: Kreitman, Mark J.
Sent: Friday, June 03, 2005 2:51 PM
To: Aguirre, Gary J.
Cc: Eichner, Jim
Subject: RE: Pequot: privilege issue re backup tapes

I'd like to see a summary of Jim's research on this point Monday. Thanks.

-----Original Message-----
From: Aguirre, Gary J.

To: Kreitman, Mark J.; Hanson, Robert; Ribelin, Eric; Eichner, Jim
Sent: 6/3/2005 2:48 PM
Subject: Pequot: privilege issue re backup tapes

I spoke with Audrey this morning with Eric and Jim present. When I asked her how she wanted to handle the tapes she proposed that the tapes go to Kroll On Track, a highly reputable firm as you may know. She wants to give more thought to the privilege issue. My take and understanding from Jim's research is that FF has an uphill battle on this one.

We will discuss again on Tuesday when Samberg's testimony is taken. All options are still on the table, including the possibility that we simply take possession of the tapes.

Since they may be forensic issues, I'm not sure how well tapes will copy.

Gary

From: Hanson, Robert
Sent: Wednesday, July 13, 2005 7:36 AM
To: Aguirre, Gary J.
Subject: RE: Proposed Storch draft

From: Aguirre, Gary J.
Sent: Tuesday, July 12, 2005 5:16 PM
To: Hanson, Robert
Subject: Proposed Storch draft

Dear Mr. Storch:

During a telephone call with the staff yesterday, you and Mr. Pollack represented that your firm represents Pequot Capital Management ("Pequot") in the above –referenced investigation in connection with Pequot's compliance with the staff's requests for information and documents (is this the proper scope?). We will therefore be dealing with your firm in the same manner that we customarily deal with any other counsel representing a party in connection with a Securities and Exchange Commission investigation.

Please feel free to contact me if you have any questions regarding this letter.

cc: Audrey Strauss

From: Kreitman, Mark J.
Sent: Friday, March 11, 2005 4:59 PM
To: Hanson, Robert; Aguirre, Gary J.
Subject: RE: One more comment

Right. Let's send Paul updated version with all changes made, try to get his attention before he leaves at about 5:30.

> To facilitate this, we agreed to accept, ~~at least~~ for purposes of the April 10 production, documents responsive to items C.10 through C.14, C.18, C.20, C.21, and C.22 generated by key word searches of all mail boxes on servers and backup tapes for the specified time periods, provided that we reach agreement on search terms, as an alternative to your strict compliance with the subpoena which requires whatever search may be necessary to locate all responsive emails and instant messages.

From: Hanson, Robert
Sent: Friday, March 11, 2005 4:32 PM
To: Aguirre, Gary J.; Kreitman, Mark J.
Subject: RE: One more comment

I think it's implicit that A applies if we can't reach agreement on B.

From: Aguirre, Gary J.
Sent: Friday, March 11, 2005 4:28 PM
To: Kreitman, Mark J.; Hanson, Robert
Subject: One more comment

Should we *expressly* put this in the alternative? Are we setting up a single way of complying with these terms of the subpoena? Can we do this? So far, they're just saying "no."

From: Hanson, Robert
Sent: Tuesday, March 15, 2005 5:28 PM
To: Aguirre, Gary J.
Subject: RE: Pequot: a prodcutive call with FF

Sounds good. Not sure I understand 2 and 3 below but assume you do.

From: Aguirre, Gary J.
Sent: Tuesday, March 15, 2005 3:14 PM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Ribelin, Eric; Conroy, Thomas; Glascoe, Stephen; Foster, Hilton
Subject: Pequot: a prodcutive call with FF

I had by far the most productive call with Kevin Harnsich about a half hour ago. We discussed every issue of concern and here's the current status:

1) **NY exams.** FF would like us to take testimony in New York.
2) **Email restoration.** The process works as I discussed in my earlier e-mail. They have "already finished restoration process or will finish it shortly." That leaves on more step: to put the files in PST archive where the key word search can be conducted. This issue now is which folders will take the next step: 27 folders (what FF wants to do) or all folders, what KH said he recalls Mark would like to do. I asked KR how much more time to do all rather than 27: he said he would know today. My take: they will do all with a little nudging.
3) **E-mail review:** They are now willing to do e-mail key word searches through restored e-mails. What they don't want to is to turn over all of the restored e-mail boxes to us. KR was telling me that we would have too many duplicative e-mails.
4) **Exam dates**: will let us now tomorrow.
5) **Questions for Onsite:** They will set a meeting; I agreed to send both KR and Noah Berlin questions by e-mail tonight.
6) **3/14 letter**: does it really mean all e-mails called for by 11/24 letter or just those in subpoena?
7) **Schedule a time on March 21 Regulation 204-2(a)(3):** will set during our next call which is scheduled for 11:30 on Thursday.
8) **Privilege log:** will try to let us know when FF will have during call on Thursday.
9) **Items C.18-C.20:** status: will let us know when non-privileged docs will be produced.
10) **Double deletes:** will do key word searches through all restored e-mails to locate.
11) **Will FF continue to ID Pequot employees who made decisions:** Yes.
12) **Purely personal e-mails:** They are producing.
13) **Cut off date for subpoena:** he's going to check to see if production per subpoena can be made by 4/10.
14) **Order entry times:** They are producing a document on an Excel worksheet with the Eze Castle data.

I will send confirming letter.

Gary

From: Kreitman, Mark J.
Sent: Tuesday, March 15, 2005 10:24 AM
To: Aguirre, Gary J.; Hanson, Robert
Subject: RE: Pequot subpoena and related issues

Let's draft a letter, moderate in tone, setting out our view of what's required, attach a supplemental subpoena for anything in doubt (clarifying in the letter why it's redundant but designed to eliminate any possible misapprehension).

From: Aguirre, Gary J.
Sent: Tuesday, March 15, 2005 9:33 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: Pequot subpoena and related issues

Bob:

I have quoted below FF's contentions from its last three letters. Where the quote was too long, I have paraphrased it. Most state, imply or hint FF has narrowed our subpoena in one way or another. As I have discussed, FF has interpreted only C.6 to call for e-mails. So far, including the CD I got this morning, they have only provided e-mails from specified employees. If theie positions stand, our subpoena is Swiss cheese. But there are other issues: Did our failure to respond to 12/8 letter delay e-mail production? OK if they don't ID other Pequot employees who made trading decisions? Meanwhile, we will spend much time getting ready for exams of Pequot employees who made not be decision makes and reviewing the wrong e-mails. The most important issues below were addressed in my e-mail yesterday, but there are some new ones too.

I suggest the following:
1) Get clarification form FF how they are responding to Mark's letter; if they are standing by their position, issue new subpoena that eliminates their issue
2) Clarify other issues with letters where possible.

Gary

A) KH to MK 2/14

1) FF "We have focused this review on the e-mail boxes for the individuals and time periods specified in Appendix B of your Subpoena" meaning: we are not producing e-mails in response to the other eight subsections of the Subpoena that call for them.
2) Purely personal e-mails: "We will not be including purely personal e-mails in our weekly productions while this request is pending." Meaning: unless it appears to be business related, the e-mail will not be produced. Are those doing insider trading reference their e-mails to business?

3) Our request for keyword searches to find specified employee e-mails. "Not clear what kind of search Mr. Aguirre's letter contemplates." Meaning: At this point, they are not searching other mailboxes to locate "double-deletes."
4) "Double-deleted" e-mails. "We have been advised that our client does not believe its exchange servers capture such e-mails." Does this language suggest they may be recaptured in some other way?
5) "Based on our February 10 call, it is our understanding that we do not have to review e-mail files in order to satisfy our obligations under items C.10-C.14 of your subpoena." Meaning: They are refusing to produce e-mails that relate to the specific trading that is the subject of this investigation. This leaves us with only the e-mails from specified employees, identified by FF, with the reservation they are not sure the list is complete.
6) Contention that sections C.10-C.14 call for additional info, which delayed FF's compliance. Using the example that C.14 now applies to "trade tickets." This is a totally specious argument. The language of C.14 is identical to language in my January 3 letter.
7) We agreed to narrow subsections 1 through C.3, C.5, C.15 through C.17 and C.21

B) KH letter of 2/22 to MK

1) FF's argument that it timely complied with e-mail production. This argument contains multiple levels of faulty premises and erroneous facts. Do we correct?
2) E-mail backup tapes. We did not respond to their letter of December 8. In fact, we responded by my letter of December 9, proposing a conference call with IT people. FF's theory at that time was (1) they would produce current e-mails first, and (2) they had to identify the employees before any e-mails could be produced.
3) Onsite-privilege issue
4) "The statement in your [Mark's] letter that it might make sense to consider the use of a keyword search through all backup tapes and servers where e-mails are stored is unclear." Meaning: FF is not going to produce issuer-related e-mails.

C) KH letter of 2/28 to GA

1) Only e-mails of Pequot employees specified in Appendix A to subpoena. "CD-ROMs contain e-mails from the e-mail boxes and time periods for the individuals specified in Appendix E of the Subpoena." Does this mean, as I suspect, that they have gone beyond withholding privileged documents?
2) "The documents Bates-stamped .... Are Reuters instant messages for the individuals and time periods specified in Appendix B of the Subpoena." Again, FF is serving notice that they are not providing

instant messaging for the other subsections of the Subpoena calling for these documents.

3) "In recognition of the fact that the Staff utilized the information in Appendix A of our letters dated January 14, January 28, and February 11 to determine what e-mails to subpoena, we assumed that further updates to our Appendix A are not required." FF's attorneys previously told us that they believed these lists were incomplete. We should request updates.

4) "Documents Bates-stamped...are from the files of Frank Slayne." This person was not identified by Pequot previously in relation to the trading transactions. In short, they are not updating their list as suggested above.

5) "During our call on February 10, we proposed that November 24 be considered the cut-off date for the subpoena so that Pequot would not have to supplement its production to account for the time period between the voluntary request and the subpoena. We understand that you accepted that suggestion." We did not. Should I correct?

6) Items C.18-C.20. "We will produce remaining non-privileged documents and redacted documents upon completion of that review." Shall we confirm status?

7) Item C.23, time of entry issue. "Pequot does not maintain the information specified in Appendix D of the subpoena in a single location, not is it required to maintain that information in any particular format. When a document in a particular format does not exist, a subpoena cannot compel the creation of such document." This is the one I believe is in Pequot's Eze Castle software. I think our problem was asking for it in a format that had come from their hedgeware software. I think we should be able to get essentially what we want in response to C.22, but this will take a follow up call.

8) Repeats contention that they cannot do electronic word searches. Meaning: No issuer e-mails nor e-mails responsive to other subsections.

9) Onsite-privilege issue

From: Gary Aguirre [mailto:gjaguirre@cs.com]
Sent: Wednesday, September 21, 2005 1:00 PM
To: 'dhruffin@verizon.net'
Cc: 'gjaguirre@cs.Com'
Subject: RE: EEO counseling

Ms. Ruffin:

Following up on our meeting yesterday and our telephone conference today, I provide the information and comments below.

My termination

I provided you yesterday with my termination memorandum of September 1, 2005, which I saw for the first time on September 6. After we met yesterday, I obtained some of my personnel files from the Division of Enforcement, including a Notification of Personnel Action, dated August 21, 2005. I had previously requested, but was not provided with the step increase information. The August 21 notice indicated that I had received a two-step pay increase based on the 2004-2005 evaluation period. It is difficult for me to reconcile the August 21 step increase with the conclusions stated offered in the September 1 memo as the basis for my termination. Also, the conclusions in the September 1 memo are inaccurate. Accordingly, to bring the factual basis for my termination into sharper focus, I suggest that you obtain a more detailed statement from Associate Director Paul Berger, regarding his decision to terminate my employment with the Commission.

As we discussed yesterday and today, the facts suggest the SEC fired me for three reasons. First, it was a form of retaliation for proceeding with my EEO and EEOC claims, particularly those based on age discrimination. Second, the termination itself was a form of age discrimination. Finally, a third unlawful basis for my termination will be stated in my complaint to the Office of Special Counsel.

Hostile Working Environment

Yesterday, I provided you with a partial overview of my hostile work environment and retaliation claims which are the basis for my contacting an EEO Counselor on July 22. I also provided you with a few concrete examples of specific events which support this claim. So that we have to time to complete our discussion, I am willing to again extend the counseling period through October 11, 2005. Please forward the appropriate forms. My fax number is: 202-328-0562.

My supervisors:

Paul Berger, Associate Director

September 7, 2004, through late January 2004

Richard Grime, Assistant Director

Charles Cain, Branch Chief

Late January 2004 through September 2, 2005

Mark Kreitman

Robert Hanson

Sincerely,

Gary Aguirre

Staiger, Charles

From: Kreitman, Mark J.
Sent: Monday, September 26, 2005 5:32 PM
To: Staiger, Charles
Cc: Berger, Paul
Subject: Gary's Evaluation

Chuck –

I don't know if the paragraph below, which was my evaluation of Gary (separate from Bob Hanson's), made it into his record. Paul suggests that it should be so included. Thanks. Mark

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chef, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

From: Hanson, Robert
Sent: Friday, August 05, 2005 11:17 AM
T : Aguirre, Gary J.
Subject: RE: Mack testimony

Gary,

I forwared this to Paul and Mark to review. I think we should meet after some of the facts in the memo are nailed down to discuss whether it makes sense to go forward. See you in a couple of weeks.

Bob

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:34 PM
To: Hanson, Robert
Subject: Mack testimony

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information

The first element is whether Mack had possible access to information that GE would make a tender offer for HF. He had access from two sources: he had been the CEO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time. Also, CSFB was "wooing" Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or CS to mention, as part of this wooing process, what inventory Mack would be taking over. Incidentally, we know how Samberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the

possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HF during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team as Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller.

a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million info Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "busting his chops" Samberg's chops because he had not got the documents on this investment. Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million

lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) *Board seats* As shown on one of the spreadsheets, Samberg was promoting Mack for board seats on both Baby C and Fresh-start.
c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.
d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."
e) *Friendship* Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo.
f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Samberg had a relationship of trust deep friendship with Mack.

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend.

In July 2001, Samberg's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was

looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and ***I did things in a manner that was expedient at the time given my expertise in this area.***

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. ***Times were fragile.*** I needed their approval to do whatever I wanted to do ***or they might walk*** (emphasis added).

There do not appear to be other leads in the Samberg e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Samberg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Samberg's circles.

Gary

From: Kreitman, Mark J.
Sent: Wednesday, August 17, 2005 11:26 AM
To: Aguirre, Gary J.; Jama, Liban A.; Eichner, Jim
Cc: Hanson, Robert
Subject: RE: Pequot pemnding matters.

Where are we on determining the date Mack was brought over the wall re GE-Heller deal – the necessary prerequisite to subpoena to Mack?

From: Aguirre, Gary J.
Sent: Friday, August 26, 2005 10:48 AM
To: Hanson, Robert
Subject: CSFB subpoena

Bob:

Has a decision been made on the CSFB subpoena? For what it's worth, my view is this: if we are to have any chance in getting over what I see as a 9' bar, these docs are critical. If you have any specific questions regarding scope, please let me know.

Thanks,

Gary

SEC DIVISION OF ENFORCEMENT
Case Closing Report

Run on 11/30/2006

Case No.: HO-09818 **Case Name:** ELITE INFORMATION GROUP, INC.

The undersigned has been designated by the Director of the Division of Enforcement to exercise delegated authority to terminate and close all investigations authorized by the Commission pursuant to Section 20 of the Securities Act of 1933 [15 U.S.C. 77t], Section 21 of the Securities Exchange Act of 1934 [15 U.S.C. 78u], Section 18 of the Public Utility Holding Company Act of 1935 [15 U.S.C. 79r], Section 42 of the Investment Company Act of 1940 [15 U.S.C. 80a-41], and section 209 of the Investment Advisers Act of 1940 [15 U.S.C. 80b-9].

I hereby close this case, pursuant to delegated authority.

Peter H. Bresm
Signature

Deputy Director
Title

11/30/06
Date

SEC DIVISION OF ENFORCEMENT
Case Closing Recomm ndation

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Case No.: HO-09818 **Case Name:** ELITE INFORMATION GROUP, IN

Case Closing Recommendation Narrative:

PEQUOT CLOSING MEMORANDUM HO-9818

This investigation involved a number of potential federal securities law violations by hedge fund adviser Pequot Capital Management ("Pequot"). In January 2005, the staff obtained a formal order of investigation from the Commission, authorizing the staff to issue subpoenas for documents and witness testimony. Thereafter, the staff issued more than 100 subpoenas requesting documents and took the testimony of 19 individuals (1). The staff also made numerous informal document requests, interviewed six individuals, and participated in two proffer sessions with the Federal Bureau of Investigation and the office of the U.S. Attorney for the Southern District of New York ("Southern District"). The potential violations investigated break down into three major categories: 1) potential insider trading by Pequot in a number of securities, including General Electric ("GE"), Heller Financial ("Heller"), Microsoft Corporation ("Microsoft"), AstraZeneca PLS ("Astra") and Par Pharmaceuticals ("Par"); 2) potential insider trading ahead of PIPE offerings; and 3) potential market manipulation. Each is addressed below.

1) Insider Trading

A.0 Trading ahead of the GE acquisition of Heller

Background: On July 30, 2001, it was publicly announced that GE had acquired Heller, causing a sharp rise in the stock price of Heller and a small decline in the stock price of GE. Pequot began accumulating Heller common stock on Monday July 2, 2001 (2) and started selling short GE stock on July 25, 2001. By closing out these positions after the merger announcement, Pequot realized a profit of nearly $17 million on Heller and approximately $1.9 million on GE (3).

In May 2005, Arthur Samberg, the head of Pequot and the individual responsible for making the trading decisions in both Heller and GE stock, initially testified to the staff that he did not remember why he decided to make the trades, but in subsequent testimony he referred to publicly available information about Heller at the time he made the trades as the basis for placing the Heller trades. However, Samberg acknowledged he was unsure whether he had actually seen this information before he made the trades.

Investigatory Steps: During the summer of 2005, the investigation focused on whether John Mack, who had a personal relationship with Samberg, as well as a number of business relationships with Pequot (4), provided Samberg with inside information about the merger ahead of the public announcement. Emails indicate that Mack and Samberg often communicated during this time and suggest that Mack spoke by telephone with Samberg about a potential investment the night of Friday, June 29, 2001, the business day before Pequot began purchasing Heller, but that the conversation related to an unrelated non-public company. Credit Suisse First Boston ("CSFB"), an investment banking firm and an adviser to Heller in the transaction, hired Mack as its CEO on July 12, 2001, ten days after Pequot began to buy Heller stock. However, counsel for CSFB advised the staff that the CFO of CSFB who met with Mack before Mack joined CSFB did not have deal information on specific pending deals on which CSFB was working. In addition, until March 2001, Mack had been the CEO of Morgan Stanley Inc., which advised GE on the transaction, but records the staff obtained show that Morgan Stanley's first contact with GE regarding a potential transaction with Heller occurred in April 2001, after Mack had already left the firm.

By November 2005, having taken the testimony of Samberg twice, interviewed Samberg's former partner, and obtained email, chronologies, documents, and information regarding Mack from several sources, including CSFB, Morgan Stanley, and Pequot, the staff had found no evidence that Mack had any information about the merger before he joined CSFB on July 12.

Starting in September 2005, the staff focused on identifying other potential tippers who could have provided Samberg information about the GE/Heller transaction. The staff reviewed Samberg's calendar to identify who he met with at the time of Pequot's trading. The staff also obtained from Pequot a list of people hired in 2001 and identified several people on that list who had connections with GE, Heller, or broker dealers involved in the merger. The staff also reviewed the emails obtained from Pequot to identify other potential tippers. The staff then compiled information about each person identified, including searching for relevant documents in the database of emails provided by Pequot.

When this research was complete, the staff evaluated whether to take the testimony of any of these potential tippers. The staff determined that while it had identified people with significant connections to Pequot or Samberg or both, there was no evidence that any knew about the merger in advance of its public announcement. Conversely, those who knew about the deal did not have sufficient connection to Pequot and/or contact with Samberg or Pequot during the relevant time period. Thus, the staff had identified a large number of potential tippers, but no likely tippers. Without any evidence suggesting that any of these people were the tipper, the staff decided taking any of their testimony would not be fruitful. At this same time, around December 2005, the focus of the insider trading case shifted to Microsoft, where it remained until June 2006.

Beginning in June 2006, the staff considered whether to take any additional investigatory steps regarding the GE/Heller trading. Ultimately, the staff took the testimony of six witnesses, and received documents requested by subpoena from each. On July 27, 2006, the staff took the testimony of two CSFB employees, a former CFO and a company lawyer, who were both involved in recruiting Mack. Both denied knowing about the merger before it was publicly announced, let alone telling Mack anything about it, and the documentary evidence did not contradict their denials. On August 1, 2006, the staff took the testimony of Mack. Mack denied knowing about the merger before he became CSFB's CEO in mid-July 2001 and denied having any discussions with Samberg or anyone else at Pequot about the merger before it was announced. He further denied having discussions with anyone at Morgan Stanley in 2001 about GE, Heller, or the GE merger with Heller. On August 17, 2006, the staff took the testimony of the head trader at Pequot who executed the trades in both Heller and GE at Samberg's direction. The head trader testified that he did not recall anything about the trades but that the size of the investment in Heller was not unusual. On September 7, 2006, the staff took the testimony of the head trader's assistant at Pequot at the time of the transactions. The assistant testified that his role at Pequot was largely administrative at that time, and he could not remember any involvement in the GE/Heller trading. On September 8, 2006, the staff took the testimony of an analyst at a brokerage firm who provided analyst coverage on Heller during the relevant time period, appeared to have met with Pequot in June 2001 shortly before Samberg started buying Heller, and went to work at Pequot in early 2002. The analyst denied having any inside information about the merger transaction before it was announced and we have found no evidence to the contrary.

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Moreover, although he was scheduled to meet with Pequot in June 2001, it appears from the analyst's personal calendar and testimony that the meeting was cancelled.

Conclusion: The staff has been unable to find any evidence that Pequot had information regarding the merger between GE and Heller before the merger was publicly announced, much less that anyone tipped Pequot or Samberg about the merger in advance of its announcement. The staff's investigation found that it is extremely unlikely that Mack tipped Samberg about the merger between GE and Heller, having found no evidence that Mack knew about the merger before Samberg started purchasing Heller stock. Moreover, emails Samberg sent evidence that Samberg did not even know about Mack joining CSFB until after it was publicly announced (5). It is unlikely that Mack told Samberg about confidential information about the merger if he learned it in connection with being recruited by CSFB, without revealing his impending employment.

There is additional evidence that casts doubt on the possibility that Pequot traded on the basis of non-public information in regard to its trading in GE and Heller. Although Pequot made a substantial profit purchasing Heller ahead of the announced merger, the size of its position in Heller was not atypical for Pequot (6) and Pequot purchased other financial stocks around the same time as the Heller purchases, clearly following the financial sector, not just Heller (7). Moreover, according to its trading records, during 2001 Pequot shorted GE stock on several different occasions (8).

B.□Trading in Microsoft

Background: In April 2001, David Zilkha, a Microsoft employee, went to work as an analyst at Pequot. Even before he officially started work at Pequot, Zilkha started providing Samberg with information about Microsoft by email, including information attributed to Microsoft employees (9). Around the same time, Samberg started buying Microsoft options, which increased in price throughout this period. In emails from this time, Samberg repeatedly gave Zilkha credit for profits Pequot made in trading Microsoft, but did not identify the specific profits or trades.

Investigatory Steps: Beginning in June 2005, and continuing thereafter, the staff provided the Southern District with information about Pequot's trading in Microsoft. In the fall of 2005, the FBI located Zilkha and interviewed him twice. On December 14, 2005 the staff participated in a proffer session with the Southern District with Zilkha. Zilkha proffered that he had obtained information from Microsoft employees and provided it to Samberg, but did not believe the information was either material or confidential.

On January 23, 2006, the staff took Samberg's testimony regarding the Microsoft trading. Samberg testified that he could not remember why he placed the trades, downplayed Zilkha's role in his trading, and denied receiving any material non-public information concerning Microsoft. On February 10, 2006, the staff conducted a second joint proffer with the Southern District with Zilkha. Zilkha proffered the names of the Microsoft employees he believed provided him with information in April 2001. Also during this time, the staff reviewed the results of subpoenas issued to Zilkha and Microsoft.

By March 2006, the staff had focused on two pieces of information Zilkha provided to Samberg by email. The first email, dated April 17, 2001, stated that a Microsoft employee had told Zilkha, a few days before a Microsoft earnings announcement, both that the controller for one of Microsoft's divisions was more "relaxed" about earnings than in previous quarters and that this information suggested the earnings news would be positive. Two days later, on April 19, Samberg purchased Microsoft call options and sold short Microsoft put options. Later that day and after the market close, Microsoft announced that its earnings had significantly exceeded analysts' expectations. The following day, April 20, Pequot sold its call options and closed out its short position in the put options, realizing a profit of approximately $1.6 million. The second email, dated April 27, 2001, stated that a Microsoft employee had told Zilkha that a rumor regarding a delay in the release of a Microsoft product was untrue. The next trading day, April 30, Samberg purchased call options in Microsoft. Two days later, May 2, Microsoft stock rose and Pequot sold the purchased options, realizing a profit of approximately $530,000.

The staff interviewed by telephone the person Zilkha identified as the source of the first tip, but she denied even knowing Zilkha, and told the staff she would never have told anyone that type of information. The FBI was unable to locate the alleged source of the second tip, who had left Microsoft and was believed to be living in Brazil. The staff interviewed two other Microsoft employees identified by Zilkha as his sources for other information he provided to Samberg around the time Pequot traded in Microsoft, and both categorically denied providing him with any information. At the end of March, the staff obtained four month tolling agreements from Pequot, Samberg and Zilkha.

The tolling agreement applied to all matters under investigation, including the Microsoft transactions.

In April 2006 the staff learned more about the product delay that was the subject of the second tip. First, the staff learned that other events, not related to the product delay rumor, caused a sharp increase in Microsoft's share price a few days after Zilkha provided the information to Samberg. Moreover, the staff learned that information relevant to both the earnings announcement and the product delay had been provided to Pequot by Goldman Sachs ("Goldman") in advance of Goldman publishing the information and before Pequot's trades. To examine whether Goldman's actions were themselves improper, the staff obtained information from Goldman and in early June took the testimony of two Goldman employees. Both told the staff that during this time they regularly provided research information to Goldman customers in advance of publishing this information, and that Goldman policy explicitly allowed this practice.

Conclusion: While the emails from Samberg praising Zilkha for his work on Microsoft suggest that Samberg may have used information from Zilkha to trade in Microsoft options, there is insufficient evidence to bring a case based on this conduct. The staff could only identify two tips that were related to profitable trading by Pequot in Microsoft. The first, the information about a controller being relaxed is vague, and the alleged source denies providing the information to Zilkha. Moreover, the information Pequot received from Goldman around the same time as Zilkha's tip about the same earnings announcement gives Samberg a justification for his trading. The second, the information about the product delay, did not drive the rise in Microsoft's stock price. Finally, the staff determined there was nothing illegal about Goldman giving its clients, including Pequot, information it developed internally, before that information was publicly disseminated.

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□C.ATrading in AstraZeneca and Par Pharmaceutical

Background: The staff also investigated Pequot's trading in AstraZeneca ("Astra") and Par Pharmaceutical ("Par"). On October 11, 2002, a federal district court issued an opinion upholding patents of Astra and declaring that Par infringed upon those patents. The court decision caused the shares of Astra to increase in price by 12% and the shares of Par to decrease in price by 21%. The staff's initial inquiry into the trading indicated that shortly before the court announced its decision, Pequot reversed its trading pattern in both stocks.

Investigatory Steps: The staff learned that the Southern District had conducted an investigation regarding whether a judicial law clerk had leaked the outcome of the patent case. That investigation had ended because the Southern District was unable to identify anyone who profited from the tip or whether there even was a tip. The staff reviewed the formal written statements prepared by the FBI from that investigation and reviewed Pequot emails but was unable to find any links between Pequot and the people interviewed in that investigation.

In November 2005, the staff examined Pequot's trading records and determined that the staff's initial inquiry presented an incomplete and misleading picture of Pequot's trading in the stocks of Astra and Par. Although from August 23, 2002 through September 25, 2002, Pequot did reverse a significant portion (approximately $18 million) of a short position it had established in Astra, Pequot was adding to its position in Par during part of the same time period (September 6 through September 11), purchasing approximately 200,000 shares of Par common for approximately $4.8 million. Pequot did not begin to reverse its long position in Par until September 27, 2002, after it had stopped reversing its Astra short position. Moreover, on October 11, 2002, the date the court decision was made public, Pequot still held a long position in Par (close to $2 million) and a significant short position in Astra (more than $8 million) (10). Both of these positions proved to be losing positions and it would have made no economic sense to maintain either of them if Pequot had inside information regarding the upcoming decision in the patent case. Finally, during 2002, from February on, Pequot traded in and out of Par and Astra.

Conclusion: It seems unlikely that Pequot had inside information about the court decision because it made investment decisions contrary to that information in the weeks leading up to the decision. Accordingly, we stopped pursuing this aspect of the investigation.

2)□Private Investments in Public Equities ("PIPES")

Background: This aspect of the investigation concerned potential insider trading by Pequot in the common stock of companies issuing PIPES ahead of the public announcement of the PIPES. The public announcement of a PIPE often causes the price of issuer's stock price to fall, making it advantageous to sell short the stock of companies who issue PIPE securities before the transactions are publicly announced. Such trading may violate the law against insider trading. The Pequot PIPE investigation was initially opened by the SEC's Northeast Regional Office ("NERO") but during the fall of 2005 transferred to the Washington office for efficiency purposes.

Investigatory Steps: Initially, the staff evaluated and reviewed Pequot's response to a subpoena issued by NERO with respect to Pequot's PIPE transactions. The staff then examined Pequot's trading activity in 101 PIPE transactions over a four year period beginning in 2001. The staff specifically examined Pequot's trading data to determine whether Pequot sold short prior to the public announcement of any PIPE it purchased. Of the 101 PIPES purchased by Pequot, the staff found that Pequot shorted ahead of the public announcements of 11, but the stock prices for 8 of the 11 did not decline materially after the announcements of the PIPE. For the three remaining issuers, Pequot sold short the issuer ahead of the public announcement but in all three cases its short selling activity occurred more than seven weeks before the PIPE was publicly announced. This would make it difficult to show that the short selling was based on material nonpublic information concerning the PIPE offering, the trading having occurred so far in advance of the public announcement of the offering (11).

Conclusion: Because the staff was unable to find instances where Pequot short sold shares within seven weeks, ahead of a public announcement of a PIPE offering in which they participated in and in which there was a material decline in the share price of the issuer, the staff stopped pursuing this aspect of the investigation.

3)□Market Manipulation

Background: During the fall of 2005 the staff began to closely evaluate two separate but similar trading practices engaged in by Pequot. The first involved Pequot's selling shares it received in numerous initial public offerings ("IPOs") and simultaneously purchasing the same number of shares soon after the shares began trading in the open market. This trading suggested that Pequot may have engaged in a manipulative trading practice because it appeared as if the trades did not involve a change in beneficial ownership (wash sales)(12). The second involved Pequot executing an agency cross trade, one side of which was a short sale and the other side was a purchase of the same security. The short sale and the buy were for the same number of shares and price and were executed simultaneously. The trade was reported as an agency cross; however, the Pequot trade blotter shows that the same Pequot funds executed both the sales and the purchases, causing no change in beneficial ownership. Again this trading was suggestive of manipulative trading.

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Investigatory Steps: The staff requested a written explanation from Pequot regarding their apparent wash sale trading and sent a follow-up subpoena to Pequot for additional information on the trading practices after receiving Pequot's explanation. Pequot provided an extensive written response explaining that its trading occurred to transfer beneficial ownership of the stocks acquired in IPOs from one class of fund investors (those eligible to participate in the offering) to another class of investors (those ineligible to participate), and was specifically sanctioned under an NASD interpretation. This explanation was consistent with Samberg's testimony concerning this practice. The staff then reviewed Pequot's supporting documentation and certifications concerning Pequot's compliance with the NASD rule and found that the documentation was consistent with Pequot's assertion that it was transferring beneficial ownership of the securities from one class of investors to another.

The staff met several times with staff from the Division of Market Regulation ("Market Regulation") concerning whether Pequot's agency cross trades violated the federal securities laws. Market Regulation recommended that the staff first evaluate the market impact from Pequot's cross trading (13). The staff then analyzed the market impact from Pequot's cross trading activity in 92 securities -- 5 New York Stock Exchange issuers; 7 American Stock Exchange issuers; 22 Nasdaq National Market System issuers; 29 Nasdaq Small Cap issuers; and 29 Over the Counter Bulletin Board issuers -- and found that there was no significant impact on both the market price and volume for any of the stocks by the cross trading activity, making it difficult to prove market manipulation by Pequot.

Conclusion: For the reasons discussed above, the staff did not pursue further the market manipulation aspects of the investigation.

There are presently outstanding FOIA requests for this matter, in addition there was a denial of a request on November 1, 2006.
All files related to the case have been retained.

Termination letters are appropriate in this case and will be sent to Pequot Capital Management, Arthur Samberg, and John Mack.

The Branch Chief, Robert B. Hanson and the Assistant Director, Mark Kreitman, have reviewed and approved this form.

Footnotes:

(1) Pequot alone made available approximately 19.8 million pages of electronic email and produced 161,500 pages of hard copy documents. The staff also issued numerous document subpoenas to broker dealers, issuers, individuals, and service providers. The hard copy documents collected in the investigation fill approximately 95 banker boxes.
(2) Pequot's brokerage firm used the name "Indian Capital Management" in its internal system to refer to these trades. Pequot employees were not aware that this was done, and neither Pequot nor the brokerage firm where the trades were placed was able to provide any explanation as to why the trades were not placed using the Pequot name. The staff did not discover any reason for the use of this name, nor, since the name was used internally by the brokerage firm, any advantage Pequot derived from its use.
(3) Pequot closed out its GE short position approximately two weeks after the merger announcement. Had it closed out the position the day after the merger announcement, its profit on the GE trades would have been approximately $900,000.
(4) Mack, his wife, and a foundation Mack controlled made significant investments in a number of Pequot funds. Mack also participated with Pequot in at least two private company investments in 2001.
(5) Similarly, email traffic between Samberg and his wife evidences that Samberg did not know that Mack was going to resign from Morgan Stanley until after the resignation was publicly announced in January 2001. Approximately two months after the public announcement, Mack officially left Morgan Stanley.
(6) Pequot has publicly stated that during the period of the staff's review, it conducted over 136,000 trades. Moreover, the size of the position Pequot accumulated in Heller was equal to approximately one and a half percent of the total assets Samberg traded in 2001. Pequot records reflect that in 2001 Pequot took positions in numerous companies in percentages approximately equal to or greater than that amount.
(7) For example, on July 2, 2001, Pequot purchased 220,900 shares of stock in American Express Inc. On July 11, 2001, Pequot had trading positions in at least twelve different financial stocks.
(8) For example, from September 26 through October 5, 2001, Pequot established a short position in GE of approximately $30 million.
(9) Zilkha used the name of only one of these individuals in emails, the remaining individuals were only identified by their generic position at Microsoft.
(10) The staff initially believed that Pequot failed to list its holding of 213,000 Astra shares on its Form 13F filed for the period ended September 30, 2002. However, Pequot trading records show that Pequot purchased Astra shares to cover existing short positions, but did not in fact own any Astra shares as of September 30, 2002.
(11) Because the staff did not find any instances in which Pequot traded on material nonpublic information ahead of the PIPE offerings, it did not evaluate whether Pequot breached a duty of trust or confidence with respect to its trading ahead of the offerings.
(12) Section 9(a)(1) of the Exchange Act prohibits certain manipulative practices, including wash sales and matched orders, when such transactions are done for the purpose of creating the false or misleading appearance of active trading in a security listed on a national securities exchange, or a false or misleading appearance with respect to the market for any such security. Section 9(a)(2) prohibits the manipulation of prices of securities listed for trading on a national exchange, and makes it unlawful for a person to engage in a series of transactions that creates actual or apparent activity or depresses the stock's price when done for the purpose of inducing others to buy or sell the security. Manipulative practices under Section 9(a) also violate Section 10(b) and Rule 10b-5 of the Exchange Act for both exchange-listed securities and over-the-counter securities. To establish a violation of Sections 9(a)(1) and 9(a)(2) specific manipulative intent must be proven.
(13) The Supreme Court has stated that manipulation "connotes intentional or willful conduct designed to defraud investors by controlling or artificially affecting the price of securities." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976) (emphasis added).

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Representations

A. FOIA

After consultation with FOIA/PA Branch, it was determined that the FOIA status of these case files is as follows (Check one):

- ☐ No FOIA concerns exist as of _____.
- ☐ FOIA request filed on _____ is pending without decision. Category F Material will be retired with balance of file.
- ☒ FOIA request was denied on 11/1/06. Category F Material will be marked to be discarded six years after decision date.
- ☐ FOIA determination was appealed and decided on _____. Category F Material will be marked to be discarded six years after decision date.

B. Category E Records

- ☐ The files contain no Category E Records.
- ☑ A copy of the Index for all designated Category E (Miscellaneous) Records is attached. All records of this case have been maintained by the General Counsel's office and the Division of Enforcement.

C. Termination Letters

- ☐ No termination letters are required.
- ☒ Termination letters will be sent to the parties listed in the case narrative.

D.
- The files relating to this case have been prepared for disposition in accordance with procedure in the memorandum, *Disposition of Records Upon the Closing of Cases* (August 20, 1993).
- Except as set forth, no access requests or protective orders are outstanding: _____
- No objection is made to eventual destruction of the files. [Consult with the Office of Chief Counsel concerning designation of any case files for Archival retention].

Based on the representations made above, the undersigned recommend(s) the closing of this case.

Signatures:

Attorney	Date 11/30/06
Branch Chief	Date 11/30/06
Asst Dir/Asst Reg Adm/ Asst Dist Adm	Date

Attach a copy of the Case Summary Report and submit this form to the Office of Chief Counsel.

SEC DIVISION OF ENFORCEMENT
Investigation Summary

Inv. No:	HO-09618-A		**Inv. Name:**	TRADING IN CERTAIN SECUF
Branch Chief:	HANSON, ROBERT B	202-551-4497		40423
Primary Staff:	EICHNER, JAMES A	202-551-4926		40421
Status:	Closed		**Open Date:**	01/14/2004
Last Event:	11/30/2006	MUI/Investigation Status Change		
Formal Order Date:	01/06/2005		**Close Date:**	11/30/2006

Possible Violations:

34 §10B	Fraud
34 §14E	Tender Offer Fraud
34 R10B-05	Fraud
34 R14E-03	Tender Offer Insider Trading

Origins:
REFRD FROM SRO-NOT V

Keywords:
FRAUD IN OFFER/SALE/PURCHASE

Trading Markets:
NASDAQ

Types of Security:
COMMON STOCK

MUI:	**MUI Case No.:**	MHO-09618	**MUI Case Name:**	ELITE INFORMATION GROUP, INC.
	MUI Status:	Closed/Investigation Opened	**MUI Open Date:**	11/14/2003
			MUI Close Date:	01/14/2004

From: Aguirre, Gary J.
Sent: Wednesday, August 03, 2005 1:13 PM
To: Eichner, Jim; Hanson, Robert; Jama, Liban A.; Ribelin, Eric
Cc: Miller, Nancy B.; Eichner, Jim
Subject: RE: Developing other possible GE-HF tippers

Not exactly an assumption. More of a working hypothesis that tip went directly to Samberg. Got there because all other trails came up dry and continue to do so--and more and more evidence pointed to the tip going directly to Samberg.

But take a stab at it. Who knows, could lead somewhere.

About your specific suggestions

#1 I have subpoenaed e-mails for possible contacts in suggestion #1—investment banking and Pequot--have come up with nothing interesting so far. While it's possible someone may admit a contact four years ago without being prompted with a document, does not seem to happen very often. Would you ask per subpoena or request for information?

#2 This has not been completely done. I have checked the ones that I thought were most probable and came up with nothing. But we now have the 3.6 million On Site database we could check. If someone has the time, the rest could be checked, about 110 names.

#3 The idea is good, but the approach may not be practical. Pequot went through major restructuring during the two months just after the HF trades, because Benton walked a way with half the staff.

I have focused on the Core Group because that's the one that is directly managed by Samberg. That's how I found Zilkha. But your suggestion reminds me that I never got around to checking out Mark Hanratty who was effectively Zilkha's replacement. Might be worth some time to check him out.

My own favorite is to try to trace some money back to a tipper through bonuses, but this came up dry.

About Nancy's idea, that was done last October when I did the first spreadsheet on the case. It was expanded into a huge project over a couple of months that thus far has not produced much. The most interesting possibility is Iridian, which we are still bluesheeting.

From: Eichner, Jim
Sent: Wednesday, August 03, 2005 9:02 AM
To: Aguirre, Gary J.; Hanson, Robert; Jama, Liban A.; Ribelin, Eric
Cc: Miller, Nancy B.; Eichner, Jim
Subject: RE: Developing other possible GE-HF tippers

My thoughts after reading Gary's memo.

It seems like our efforts so far have been based on the assumption that Samberg got the tip directly. While this seems like the most likely explanation, it may not be the only possibility. The Microsoft trading shows that Samberg wasn't that risk adverse in following tips (especially when they reflect inside information). As Gary astutely observed, the GE/Heller trade was at a time of desperation for Samberg given the impending break up of Pequot. The break up also may have given other Pequot employees the incentive to try and make hay with Samberg in an attempt to move up the corporate ladder when Pequot split (what better way to curry favor than inside information on GE/Heller.

To me this suggests broadening our focus from Samberg to Pequot as a whole. I have only a couple of thoughts of how to do this and would welcome others. Forgive me if these have already been done.

1) Have each person who knew about the deal at the five investment bankers and GE/Heller identify who they knew at Pequot at the time of the deal.
2) Search all Pequot email to everyone at the five investment bankers and GE/Heller
3) Try and identify anyone at Pequot who got promoted soon after the GE/Heller deal

Nancy had a very good idea which I will pass along. She suggested going through all the referrals we got on Pequot and looking for common people/entities.

From: Aguirre, Gary J.
Sent: Thursday, July 28, 2005 7:03 AM
T : Hanson, Robert; Jama, Liban A.; Ribelin, Eric; Eichner, Jim
Subject: Developing other possible GE-HF tippers

I circulated my June 28 memo yesterday to Jim and Liban, but later remembered that it explicitly assumes knowledge of my June 27 memo. I am therefore attaching that memo. I also thought I should put Eric and Bob on the recipient's list, so I am attaching both memos to this e-mail.

Following up on the discussion yesterday, I am also attaching the part of the Samberg exam where I asked him about his acquaintances at Morgan Stanley in 2001, to be distinguished from the questions about his contacts with anyone at MS who had any involvement in the acquisition. Like John Mack, most of these people are fairly prominent, e.g., Byron Wien. I did not run thorough searches on Onsite's or our databases for those on Samberg's Morgan Stanley acquaintance list. Although I have my doubts from my review of Samberg's e-mails, it is conceivably possible to develop the facts suggesting a possible tipper: trust relationship with Samberg, possible access to info, contacts with Samberg at key times, and motive to pass along tip.

However, if you get that far, there will remain another obstacle as I understand our current thinking--establishing evidence that the person "went over the wall" before you can take his or her exam. I suspect that will not be easy to do.

From: Hanson, Robert
Sent: Wednesday, August 03, 2005 8:59 PM
To: Eichner, Jim; Aguirre, Gary J.; Jama, Liban A.; Ribelin, Eric
Cc: Miller, Nancy B.
Subject: Re: Developing other possible GE-HF tippers

These sound like excellent ideas to me. Building on 3 below, do we know how everyone is compensated at pequot? Oftentimes traders get a percentage of the profits they earn for the firm. Do we have the documents to confirm that samberg was the only one who got a piece of the action on ge/heller?
My guess is that the people involved in the transaction was limited to those on the happy face e-mail. My recollection is that means three people. Are all three scheduled for september?

Seems like we should ask the firms and ge to help us identify those who knew folk at pequot, just like we ask for the information in a chronology. Can jim or gary handle that?

Leban, why don't you take a crack at two below and see what turns up.

Also still want to know if mack got in the fund when it was closed or retroactivley. Is that information on its way?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Eichner, Jim [redacted]
To: Aguirre, Gary J. [redacted]; Hanson, Robert [redacted]; Jama, Liban A. [redacted] Ribelin, Eric [redacted]
CC: Miller, Nancy B. [redacted]; Eichner, Jim [redacted]
Sent: Wed Aug 03 09:02:19 2005
Subject: RE: Developing other possible GE-HF tippers

My thoughts after reading Gary's memo.

It seems like our efforts so far have been based on the assumption that Samberg got the tip directly. While this seems like the most likely explanation, it may not be the only possibility. The Microsoft trading shows that Samberg wasn't that risk adverse in following tips (especially when they reflect inside information). As Gary astutely observed, the GE/Heller trade was at a time of desperation for Samberg given the impending break up of Pequot. The break up also may have given other Pequot employees the incentive to try and make hay with Samberg in an attempt to move up the corporate ladder when Pequot split (what better way to curry favor than inside information on GE/Heller.

To me this suggests broadening our focus from Samberg to Pequot as a whole. I have only a couple of thoughts of how to do this and would welcome others. Forgive me if these have already been done.

1) Have each person who knew about the deal at the five investment bankers and GE/Heller identify who they knew at Pequot at the time of the deal.

2) Search all Pequot email to everyone at the five investment bankers and GE/Heller

3) Try and identify anyone at Pequot who got promoted soon after the GE/Heller deal

Nancy had a very good idea which I will pass along. She suggested going through all the referrals we got on Pequot and looking for common people/entities.

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:08 AM
To: Hanson, Robert; Eichner, Jim; Jama, Liban A.; Ribelin, Eric
Cc: Miller, Nancy B.
Subject: RE: Developing other possible GE-HF tippers

I responded to Jim's memo yesterday, but missed Bob's.

These sound like excellent ideas to me. Building on 3 below, do we know how everyone is compensated at pequot?
Yes, it was covered with Samberg.

Oftentimes traders get a percentage of the profits they earn for the firm. Do we have the documents to confirm that samberg was the only one who got a piece of the action on ge/heller?

This subpoenaed for items below went out last month and FF says they don't have 3 for 2001 or 4 at all.

> 3 Each "Closed Positions Report," as this term has been used by PCM (for example in bates number documents PCM 081238 through PCM 081244), generated, prepared or circulated during the period from January 1, 2001 through the present, for each portfolio manager, analyst or other employee of Pequot Capital Management, including, but not limited to, Mark Broach, Faraz Naqvi, Arthur Samberg, James Yacobucci, Seven Zamsky, Ramu Thiagarajan, Robert Webster, Gerald Poch, Paul Farrell, and Lawrence Lenihan;
>
> 4 All accounting records, communications and other documents showing, containing, indicating or relating to any bonuses or compensation received by any PCM employee including, but not limited to, Arthur Samberg, Peter Dartley, Jared Mehl, Kate Suber, and Patrick McDonald, as a consequence of profits or losses incurred in connection with PCM's trading in the securities of Heller Financial, Inc., or General Electric Company for the calendar year of 2001;

Seems like we should ask the firms and get to help us identify those who knew folk at pequot, just like we ask for the information in a chronology. Can jim or gary handle that? That was done with MS months ago, and it produced eight groups and their e-mails were produced. We asked MS, CSFB and Merrill, JP Morgan for all e-mails. Nothing interesting was produced.

Leban, why don't you take a crack at two below and see what turns up.

You should use On Site E-mails

Also still want to know if mack got in the fund when it was closed or retroactivley. Is that information on its way?

Don't recall this request, but will get to you when I'm next in office. In one e-mail Samberg said all funds were closed but one, Pequot Partners. Still, Mack was able to put more money into finds, including Scott. Some key e-mails are on first attachment. The second attachment is Mack family 15 holdings in PQ funds. Most had $5 million minimum, but I'm not completed sure how that worked for Mack. Also, perhaps even more important was Mack getting into private PQ deals, including the most important one of all—the one he got into on evening that he is suspected of communicating tip. It took some real pushing for him to get $5 million into "Fresh Start." I think it was a 6/20 e-mail where Samberg says Mack is "breaking my chops" about Fresh Start, a special spin-off from Lucent that PQ got cheap. My best estimate is that Mack got about $20 million into various PQ deals and funds during first half of 2001. Given the Samberg return at that time, Mack would likely have been thinking of a return of at least $5 million year.

From: Aguirre, Gary J.
Sent: Friday, August 26, 2005 3:42 PM
To: Kreitman, Mark J.; Hanson, Robert; Eichner, Jim; Ribelin, Eric; Jama, Liban A.
Subject: S/L will soon be an issue in GE/Heller 10b against Samberg

I have previously stated my views on the examination scheduling.

But the Harnisch-Iason play—and that's what it is--is a reminder of our S/L problem. Assuming we schedule Samberg's testimony a week after Dartley's, which tactically makes the most sense, the five year Statute of Limitations for 10b will begin to expire in eight months and will fully expire in nine.

From those eight to nine months, you can subtract very liberally for Thanksgiving and all Christian and Jewish holidays. You can bet all defendants have this in mind and are acting in collaboration to drag out our investigation.

We have miles to go before we could file a 10b action against Samberg and the investigation on these examinations and other aspects has slowed to a snail's pace. I do not see why are so relaxed about the scheduling on these exams and others. It may bite us in the end.

From: Jama, Liban A.
Sent: Friday, August 26, 2005 11:38 AM
To: Aguirre, Gary J.
Cc: Eichner, Jim
Subject: RE: PQ

Benton- Benjamin has suggested Sept. 28th. He stated that Benton is out of town from 19-26th. We have a call with Benjamin later today regarding the subpoena; however, I wanted to see whether you would have any conflicts on 29th. Jim and I have testimony in other case on the 27th, otherwise our calendar is open. Is Benton's testimony going to take place in New York?

Dartley- His counsel is currently suggesting October 11th, which the first business day after the Columbus day holiday. We can try push for an earlier date, however, we may need to keep in mind that the Jewish New Year is on October 4th. The only conflict I have on my calendar is October 7th.

Samberg- We have not heard back on any dates. Harnish stated that most of lawyers involved are out the office until Labor day, and that we should be hearing back on some dates at that time.

From: Aguirre, Gary J.
Sent: Friday, August 26, 2005 10:44 AM
To: Jama, Liban A.
Subject: PQ

Got any dates for Benton, Dartley and Samberg?

From: ORourke, Kevin
Sent: Wednesday, May 25, 2005 10:14 AM
To: Aguirre, Gary J.; Hanson, Robert; Foster, Hilton; Ribelin, Eric; Eichner, Jim; Ivarone, Jason
Cc: Kreitman, Mark J.
Subject: Re: Taking it upon myself?

I didn't realize that you were the sensitive type.
Sent from BlackBerry Wireless Handheld.

-----Original Message-----
From: Aguirre, Gary J. [redacted]>
To: ORourke, Kevin [redacted]>; Hanson, Robert [redacted]; Foster, Hilton [redacted]>; Ribelin, Eric [redacted]; Eichner, Jim [redacted]>; Ivarone, Jason [redacted]
CC: Kreitman, Mark J. [redacted]
Sent: Tue May 24 21:32:01 2005
Subject: Taking it upon myself?

Kevin:

Your last e-mail deserves a more detailed response. I will respond to each point below.

"I see no reason to make the statement about Commission policy and suggest you take it out."

I proposed the statement because my AD told Audrey Strauss that we would return all unprivileged documents which were inadvertently produced if Fried Frank would conduct an electronic search to identify potentially unprivileged documents. I thought his proposal was an excellent one. Three months later, Fried Frank offered to do exactly what my AD proposed. As government lawyers, I thought we should stand by our prior offer. By my e-mail this morning, I circulated a draft inviting comments on my draft by all staff, including yourself, and highlighting the proposed language for comment.

Further, I question whether you are correct. I have not looked at the policy in years but I recall that it is only Enforcement's internal policy, with a number of factors to be weighed.

-

Perhaps, it's time that you take another look at the policy. The draft I sent you this morning carefully tracks the language of the guidelines pasted below. After weighing all factors, the guidelines boil down to this: 1) we return any document that is clearly privileged and 2) we return or notify the party's attorney if the document is possibly privileged. That is exactly what my proposed language stated.

Your point that it is Enforcement's internal policy may be a valid one. Unfortunately, it got lost in the tone of your e-mail. On the other hand, perhaps the fact that Commission attorneys operate under ethical guidelines should not be kept a secret. I merely raise the question.

[A]nd [I] see no reason why you should take it upon yourself to do so, especially when there is no need to do so.

I took nothing upon myself. I circulated a draft and highlighted language that was intended to implement statements made by my AD to Pequot's counsel. Your advisory comments were invited, but not your insults. I suggest that you keep those to yourself in the future.

Gary

Gary J. Aguirre

Senior Counsel

Division of Enforcement

Securities and Exchange Commission

Phone: [redacted]

Fax: [redacted]

mailto: [redacted]

From: ORourke, Kevin
Sent: Tuesday, May 24, 2005 5:54 PM
To: Aguirre, Gary J.; Hanson, Robert; Foster, Hilton; Ribelin, Eric; Eichner, Jim; Ivarone, Jason
Cc: Kreitman, Mark J.
Subject: RE: Draft of letter re PCM e-mail production

I see no reason to make the statement about Commission policy and suggest you take it out. Further, I question whether you are correct. I have not looked at the policy in years, but I recall that it is only Enforcement's internal policy, with a number of factors to be weighed. I have never seen it divulged publicly, and see no reason why you should take it upon yourself to do so, especially when there is no need to do so.

From: Aguirre, Gary J.
Sent: Tuesday, May 24, 2005 5:48 PM
To: ORourke, Kevin; Hanson, Robert; Foster, Hilton; Ribelin, Eric; Eichner, Jim; Ivarone, Jason
Cc: Kreitman, Mark J.
Subject: RE: Draft of letter re PCM e-mail production

I proposed the language for two reasons. First, it is written Commission policy. My redraft follows the language of the guideline more carefully. Second, the idea that Pried Frank conduct an electronic search to identify potentially privileged documents, rather than a page by page review, was suggested by us during a conference call in February. That was the procedure used by the Commission, according to Mike Loesch, in Bank of America Securities. Second, in response to Audrey's reaction, we agreed to return inadvertently produced

privileged documents. The statement about SEC guidelines is something less in my opinion that telling them that we will return the document if we come across it. I reread the guideline and redrafted the language as stated below.

However, I don't think the point is a deal breaker if the consensus is to delete the language.

Redraft now reads:

Staff will return any privileged material that was inadvertently produced by PCM's counsel upon its request. Further, the Staff represents that the Commission's policy is to return an inadvertently produced document that is clearly a privileged attorney-client communication, without a request to do so, and 2) to either return or notify the party's counsel if an inadvertently produced document contains material that is possibly privileged.

Gary J. Aguirre

Senior Counsel

Division of Enforcement

Securities and Exchange Commission

Phone: [redacted]

Fax: [redacted]

mailto: [redacted]

From: ORourke, Kevin
Sent: Tuesday, May 24, 2005 5:04 PM
To: Aguirre, Gary J.; Hanson, Robert; Foster, Hilton; Ribelin, Eric; Eichner, Jim; Ivarone, Jason
Cc: Kreitman, Mark J.
Subject: RE: Draft of letter re PCM e-mail production

Why are you making a representation as to what the policy is re inadvertently produced documents. I suggest that you make no such representation.

From: Aguirre, Gary J.
Sent: Tuesday, May 24, 2005 9:21 AM
To: Hanson, Robert; Foster, Hilton; Ribelin, Eric; Eichner, Jim; ORourke, Kevin; Ivarone, Jason
Cc: Kreitman, Mark J.
Subject: Draft of letter re PCM e-mail production

I am attaching the final draft of my letter to Fried Frank dealing with e-mail production, with the exception of a provision dealing with the compliance officer's e-mails, an issue that I will try to pin down this morning.

Apparently, as suspected, FF has produced very few (500 at most) of the 50,000 e-mails to or from the PCM's compliance officer called for in different ways by our 11/24 letter, three subpoenas and numerous letters. Audrey is digging in her heels on this point. I suspect these e-some of these mails relate to books and records violations as well as internal PQ investigations dealing with insider trading. However, these are not our first priority. I'll send a long an update on this issue after I speak with Audrey this morning.

In general, I think this is a big step forward, but there's another one coming up. I see Fried Frank's strategy as giving up the outer Castle wall and retreating to the inner one (claims that over 200,000 e-mails, including the 50,000 mentioned above, must be reviewed for privilege).

Bob: I need to get the guidelines again relating to the return of inadvertently produced privileged communications.

Jason: I have a question for you in the draft and I would also like to work with you today, if you have a little time, on the letter that deals with security.

Eric: I left your marked up draft at the office, so I will incorporate your edits when I get in this morning

Jim: This document will impact all aspects of this investigation and would appreciate your comments although I understand it's pretty new.

Hilton: any thoughts?

Gary

From: Aguirre, Gary J.
Sent: Thursday, May 26, 2005 8:21 AM
To: Hanson, Robert
Subject: PQ

Bob:

As we discussed, Audrey has been nibbling away at the arrangement we made last Thursday. Last night, she did a great job of spooking On Site people into saying they made not be able to issuer e-mail production outlined in the draft letter, although it was the same one we had discussed the day before. I think On Site would love to get this job and they were trying very hard to get over Audrey's efforts to trim the production. I think Audrey would like to trim it a bit at a time. But she's not holding the cards to do that.

On reflection, I see Audrey's moves are bluff. If she nibbles to the point that we no longer consent to the proposed production, she looses much more than we. Here is where things would stand if decided she had nibbled too much:

1) Trader e-mails under 2/7 subpoena already produced;
2) Trader e-mails for the 34 PQ employees under 3/22 subpoena are done, electronic privilege review done, *and all due tomorrow.* Only time requirement is to put e-mails on CDs, which Jason thinks won't take long. FF has given us list of attorneys used for screen and claims only those e-mails were held back.
3) Poquot in default on issuer e-mails and compliance related e-mails due under our 2/7 subpoena. Our letters confirming these defaults are unanswered or poorly answered. This is what worries Audrey the most.
4) We know that FF holding IMs and 50,000 compliance officer e-mails, which puts Pequot and FF in deeper hole.
5) Hence, when we have e-mails for 34 on CDs, FF has lost leverage, we have big chunk of what we want, and Pequot is in deeper default, with no arrangement with us to soften its default.

I came back to see you but you to discuss the above but you we're gone. I sent Audrey a letter-note last night covering a couple of point, including this one. I left it up to her to workout our proposal with On Site and, absent that, Pequot would have to comply with the subpoena. She called this morning. I told her we have spent a week on the her proposal and it was time to document it if that was what we were going to do.

Gary

May 25, 2005

Via Facsimile to [redacted]nd via Regular Mail

Audrey Strauss, Esq.
Fried, Frank Harris, Shriver & Jacobson
One New York Plaza
New York, NY 10004

Re: In the Matter of Trading in Certain Securities; MHO-9818

Dear Ms. Strauss:

Over the past week, we have discussed an alternative procedure for your client, Pequot Capital Management, to comply with our outstanding subpoenas. It appears that an impasse may have been reached today. If you have any new information after speaking with On Site tomorrow, please advise us in that regard. Meanwhile, we look forward to your client's prompt compliance with our outstanding subpoenas.

On one other matter, I understand that you have given priority to preparing a privilege log for Mr. Samberg. I would suggest that the log begin with the date of January 1, 2001, and work forward.

Please feel free to contact me if you have any questions regarding my comments above.

Sincerely,

Gary J. Aguirre
Senior Counsel

Hand delivered
to Paul's mail box on 1/10/05

January 10, 2005

Paul R. Berger,
Associate Director
Division of Enforcement
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: Request to be transferred

Dear Paul:

By this letter, I am formally requesting a transfer from the branch to which I have been assigned. My only request is that the transfer not be into another situation where my age and, consequently, my experience is an obstacle that must be overcome each day.

You have raised the question in the past whether the issue is my ability to take instructions from a younger supervisor. Respectfully, I must tell you that this is not the case. When I decided to return to the practice of law to work in public service, I knew that my supervisors would be younger, just as I knew my professors would be younger, and my colleagues would be younger. Almost all my SEC interviewers were younger. I looked forward to working with and learning from younger supervisors and colleagues, just as I looked forward to receiving the guidance of my younger, bright and quick-witted Branch Chief.

Further, since I joined the Commission staff, I have actively solicited the guidance of younger staff members, some far younger than my Branch Chief. On the Pequot matter, I am working with eleven other staff members, all younger than I, and with one exception, far younger. I have an excellent working relationship with each of them.

But there is another side to working with younger workers. If someone works hard over a lifetime at a profession, they tend to develop some skills. Those skills become part of the person. When I became employed here, no one suggested, for example, that I should forget the importance of documents in a financial fraud case. I am now in a situation where the option is to remain silent or incur the anger of my Branch Chief. Being male, in my judgment, disserves the SEC's mission. I am prepared to document these assertions if it would assist you in deciding the merits of my request.

Now that I have been here for a while, I can see there are many situations where this problem would not occur. For example, as we have discussed, I understand that there will be an opening in Mark Kaufman's section in the near future and I would appreciate being transferred there if possible. But I believe there are many others with whom I could work where my age and, consequently, my experience would not be a detriment. I would hope that this could be taken into consideration should you decide to grant my request.

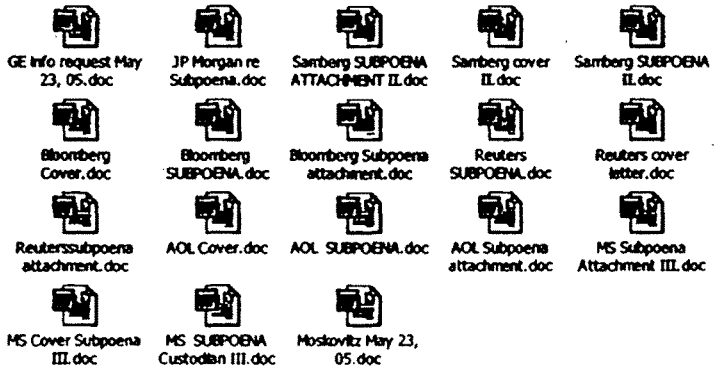
Your consideration of my request is appreciated. I would also appreciate being advised of your decision after you feel you have fully considered this request.

Very truly yours,

[redacted]

From: Aguirre, Gary J.
Sent: Monday, May 23, 2005 4:34 AM
To: Hanson, Robert
Subject: subpoenas and other correspondence to be faxed on Monday

These were leftovers from last weekend.



From: Aguirre, Gary L.
Sent: Tuesday, May 24, 2005 1:29 PM
To: Hanson, Robert
Subject: Urgent, Samberg subpoena

We need to get this out ASAP to have any chance of getting these docs before his exam.

Produce all documents in your possession, custody or control described below:

1. Documents sufficient to identify each cellular, residential and office telephone number assigned to and/or regularly used by Art Samberg or Rebecca Samberg at any time during the period January 1, 2001, to the present, together with the names and addresses of the telephone companies associated with each such number.

2. Telephone billing records or similar documents which reflect incoming and/or outgoing telephone calls for each telephone number for Art Samberg during the period from January 1, 2001, through the present;

3. All instant messaging to or from Arthur Samberg May 1, 2001, through July 31, 2001, and September 1, 2002, through November 30, 2002;

4. All credit card statements in the name of Arthur J. Samberg for the activity periods from May 1, 2001, through July 31, 2001, and September 1, 2002, through November 30, 2002;

5. All documents relating to Heller Financial which were reviewed, read, inspected or otherwise considered by Arthur Samberg, including those shown to him by his counsel, in connection with his testimony on May 10, 2005.

Gary

From: Sporkin, Thomas
Sent: Thursday, May 26, 2005 10:08 AM
To: Aguirre, Gary J.
Subject:

http:[redacted]enforcement/privacy/Compendium/Compendium.htm

From: Sporkin, Thomas
Sent: Thursday, May 26, 2005 10:16 AM
To: Aguirre, Gary J.
Subject:

http://enf[redacted]privacy/rfpa/rfpa.htm

Aguirre, Gary J.

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 11:19 AM
To: Kreitman, Mark J.
Subject: RE: Pequot pennding matters.

Will do.

From: Kreitman, Mark J.
Sent: Wednesday, August 17, 2005 11:22 AM
To: Aguirre, Gary J.
Cc: Hanson, Robert
Subject: RE: Pequot pennding matters.

Please copy Bob Hanson on all email relating to this case.

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 11:21 AM
To: Jama, Liban A.; Eichner, Jim
Cc: Kreitman, Mark J.
Subject: Pequot pennding matters.

I summarize below a list of pending matters following up on our conversations over the past couple of days, yesterday with Liban alone. Thee items in bold will be the subject of phone calls this afternoon, if you would like to sit in.

Mark: since Bob is out, I am copying you on the list. I am leaving for vacation tomorrow, which I cleared with Bob.

1) **Confirm exam date for Benton in NY for week of 9/5; get exam room and reporter;**
2) **Confirm exam dates for Dartley for week of Sept. 19 in DC and Samberg for week of Sept. 26 for NY; get exam room and reporter;**
3) **Pequot subpoena: Press Herubin for compliance with July subpoena (lets discuss);**
4) **Get status from Starch on each class of back up tapes.**
5) **Morgan Staley: Get clarification from Ashley Wall on any soft spots in her letter re MS subpoena compliance; you can tackle this if you want while I'm out or I'll do when I'm back.**
6) Status of FBI contact with Zilkha; we want Samberg exam immediately after Zilkha interview; we're waiting agent's callback. Agent is David Markel, tel # 718-286-7385
7) Telephone company subpoenas: Any useful phone records produced of Samberg calls from mid-June through end of July?
8) CSFB: Get press on Patalino for the following:
    a) July subpoena paragraph 1: Thornberg and Rady's e-mails with Mack; Mack–CS (as parent) e-mails;
    b) July subpoena paragraph 2: Thornberg or Radis notes or memos re Mack; CS notes or memos re Mack
    c) Letter to Patalino on above;

d) Look for August 30 production of items 3-8.
e) Remind Patalino next week if we do not have his letter re above.
f) August 17 subpoenas: we need to work out; he will ID info flow; we make sure his doc review gets docs.

9) Andor backup tapes issue: See my memo raising construction issue on Pequot-Andor agreement (will send an e-mail on this today);

10) Other acquisition players have contacts with Pequot before Samberg trades? You can ask them to collect this info by request letter. However, I doubt they will admit w/o docs. GE and JP Morgan my no docs. You have Wall letter. Need to check with Merrill on Hughes.

Aguirre, Gary J.

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 1:17 PM
To: Eichner, Jim; Jarne, Liban A.
Subject: RE: PQ calls

From: Eichner, Jim
Sent: Wednesday, August 17, 2005 1:09 PM
To: Aguirre, Gary J.; Jarne, Liban A.
Subject: RE: PQ calls

I'm free at 2.

A few questions/thoughts

If you aren't going to be back until the 6th do we really want to take Benton's exam that week?
Good for background for Dartley and Samberg exams.

I don't think Liban has had the chance to look at the back up materials. Should we wait to call until he has?
This testimony is for all our learning curves.

What is the issue with Hamish. I thought they were going to complete the production by 8/23?
He was to give us some feedback today whether they have Mack trading records. Also, some other gaps in subpoena.

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 1:06 PM
To: Jarne, Liban A.; Eichner, Jim
Subject: PQ calls

Could anyone who wishes to participate in phone calls be available around 2 pm?

1) Confirm exam date for Benton in NY for week of 9/5; get exam room and reporter;
2) Confirm exam dates for Dartley for week of Sept. 19 in DC and Samberg for week of Sept. 26 for NY; get exam room and reporter;
3) Pequot subpoena: Press Hamish for compliance with July subpoena (lets discuss);
4) Get status from Storch on each class of back up tapes.
5) Morgan Staley: Get clarification from Ashley Wall on any soft spots in her letter re MS subpoena compliance; you can tackle this if you want while I'm out or I'll do when I'm back.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission

8/17/2005

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 1:25 PM
To: Hanson, Robert; Kreitman, Mark J.
Subject: RE: Benton's Testimony

Mark/Bob,

Two points:

Jim did not tell me "from the get go" that he had testimony on the 14th. He told me he had testimony scheduled during the week of the 12th, but did not specify the dates. I tried to accommodate his schedule until Jim Benjamin, Andor's attorney, said Benton was not available during the week of the 5th, when we had requested his testimony. I went off the line to ask Jim E if we could go ahead during the week of the 12th. He agreed and made no mention that we should avoid the 14th or 15th. I went back on line and told Benjamin he could give us any date during the week of the 12th. Jim said nothing. Had he raised the issue, I would have limited the dates by Jim's availability. When Benjamin came back later with the 14th, Jim said he had an examination on that date. We went back to Benjamin a couple more times, finally pressing him for the 15th, which he agreed to do by rescheduling his calendar. Then, Jim said he had testimony on that day as well. Hence, we now have to go back for another change only because we are cannot get our own calendars straight. I do not like handling any defense counsel this way, particularly one who is very cooperative and can provide us with extremely valuable information if he has confidence in us. In short, I believe our dealings with Benjamin were counterproductive to our goals. I do not understand why Jim did not speak out during the break I took in the conversation with Benjamin: "The week of September 12 is OK except for the 14 and 15, when I have examinations." He could also have done this when I went back on the line with Benjamin. Instead, we learned about his examination on the 14th after Benjamin said he could schedule it on the 14th, and we learned about his examination on the 15th, after Benjamin said he could schedule it on the 15th. So, we are now going back to Benjamin for yet another date simply because we cannot get our own calendars straight.

Second, I have discussed at length with Jim and Liban the importance of the scheduling sequence: Benton, Dartley, and then Samberg. Based on my understanding of the Benton-Samberg relationship, and the level of cooperation we have received thus far, I am hopeful that Benton will give us some information that will be useful during both Dartley and Samberg's testimonies.

I find this situation and the personal comments by Jim to be disturbing. Prior to the conversation referred to above with Benjamin, I repeatedly told Jim that **Benjamin was not objecting** to the production of the Andor tapes. Jim ignored my comments and repeatedly stated we have to find out Andor's position. This has moved in circles for weeks. To put the matter to rest, I put this question to Benjamin during the call with Liban and Jim E: "Jim, would you refresh me on your position on the Andor tapes?" He again said Andor had no objection and he had placed this issue in Pequot's lap, which was all he thought he had to do under the agreement. Jim E then picked up the conversation and asked Benjamin the same thing in a different way and once again got

the same answer. He then went a step further: he asked Benjamin his opinion of the validity of Pequot's position. I did not object to Jim's question because I did not want to emphasize it, but I do not think it is appropriate for an SEC attorney to ask Benjamin, Andor's attorney, how he feels about the position Strauss is taking on behalf of Pequot. This suggests that we do not have confidence in our own analysis. If we do not, why should Benjamin? Further, we can assume that Benjamin and Audrey are talking and that Benjamin will pass along to Audrey the fact that we are asking him about the validity of her position. You guys make the calls, but I think this demonstrates a certain lack of confidence on our part. As you must know, Audrey is adept at exploiting weaknesses in the SEC's position.

After the call, Jim E said that Benjamin would have to take a more concrete position, something other than: "I do not object." I disagreed: Benjamin has stated that he does not object. He has even stated that his notice to Pequot discharges Andor's obligations under the agreement. Why do we believe he is obligated to take a different position? During the same discussion, I told Jim E that I had seen case law which disagreed with the premises of his legal theory. He responded "I don't believe you." In short, Jim did not seem receptive to considering my thoughts on this issue. Jim E's position is based on a fundamental misunderstanding of the law relevant to the interpretation of the Andor-Pequot agreement, but I will be making a separate memorandum on that issue when I get back.

I would like to enjoy with Jim the same relationship I have with the other members of the team, however, I am concerned that positions taken by Jim could adversely affect the outcome of this investigation.

Gary

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 3:05 PM
To: Aguirre, Gary J.
Subject: RE: Mack testimony

Gary,

I read your "over the wall" e-mail when you sent it by cc to me. I assumed that Mark used that phrase to mean whether Mack had the information, not in the technical sense of the phrase (I doubt the technical sense would have any relevance in this case). I still recommend that we try and figure out whether Mack had the information before approaching him.

Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony. As far as I know politics are never involved in determining whether to take someone's testimony. I've not seen it done at this agency. It does make sense though to have all your ducks in a row before approaching a signficant witness like Mack. Hence, the reason to try and figure out a number of things about him before scheduling him up, not least of which is whether he knew about the deal.

Less importantly, perhaps I was wrong but I thought the word assessment came from your e-mail. If not, my bad. As for urgency, I just wanted to understand when Paul asked for the information, since I heard it from him but never from you (not the normal way to keep informed). Also, can I get a copy of the lengthly e-mails or memos you sent Paul in mid-July? It's important for me to be kept in the loop on things that have a bearing on the case.

Thanks.

From: Grime, Richard
Sent: Friday, January 07, 2005 3:33 PM
To: Cain, Charles; Aguirre, Gary J.
Cc: Foster, Hilton
Subject: RE: Emailitis: DJO's issue with emails spreading since Francois testimony

That would go for everyone who has been sent a voluntary request.

From: Cain, Charles
Sent: Friday, January 07, 2005 2:45 PM
To: Aguirre, Gary J.; Grime, Richard
Cc: Foster, Hilton
Subject: RE: Emailitis: DJO's issue with emails spreading since Francois testimony

While it may not ultimately get us any better results than the responses to our voluntary requests, we should subpoena everything that we asked for originally.

C.

From: Aguirre, Gary J.
Sent: Friday, January 07, 2005 1:27 PM
To: Grime, Richard; Cain, Charles
Cc: Foster, Hilton
Subject: Emailitis: DJO's issue with emails spreading since Francois testimony

Since the examination of Francois on 12/30, where I used numerous emails and other documents, other issuers' counsel is having new problems producing and finding emails. This one below is the second one in two days. As a third, last night Harnisch told me he was unable to answer section C of our request. Section E requests Pequot to produce emails of those identified in C.

Gary

From: Guo, Xinxin [mailt[redacted]
Sent: Thursday, January 06, 2005 5:39 PM
To: 'Aguirre, Gary J.'
Cc: Clavere, Eilleen
Subject: RE: Trading in Certain Securities HO-9818

Mr. Aguirre:

The "document retention policy" that Eilleen referred to in her email provides an explanation as for why no incoming emails from Pequot employees to any Broadview employees have been provided. Prior to Jefferies' acquisition of Broadview, Broadview retained only copies of outgoing emails of its employees as a matter of practice. Since Jefferies' acquisition in December 2003, Broadview has been required to retain copies of all incoming and outgoing emails of its employees in accordance with Jefferies' policy.

It is my understanding that Jefferies has not been able to recover any incoming emails as they were not saved, but I will confirm whether there were any backup tapes from which the emails may be recovered.

I'm free tomorrow between 8:00 and 10:00 am PST if you'd like to set up a call.

Regards,

Xinxin Guo, Esq.
Kirkpatrick & Lockhart Nicholson Graham LLP
Four Embarcadero Center 10th Flr
San Francisco, CA 94111
Direct: [redacted]
Fax: [redacted]
www.klng.com
This electronic message contains information from the law firm of Kirkpatrick & Lockhart Nicholson Graham LLP. The contents of this e-mail are confidential and may be protected by the attorney-client or other privileges. The information is intended for the use of the addressee(s) only. If you are not an addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this e-mail in error, please contact me immediately at the phone number or addresses above.

-—Original Message---
From: Aguirre, Gary J. [mailto:[redacted]
Sent: Thursday, January 06, 2005 1:33 PM
To: Guo, Xinxin
Subject: RE: Trading in Certain Securities HO-9818

Ms. Guo:

In connection with Ms Clavere's email below, would you kindly advise what Ms. Clavere had in mind by "Broadview's document retention policy" prior to its acquisition by Jefferies and, secondly, whether it is your position that you have provided all emails requested by my letter of December 1, 2004.

Further, I have asked that you explain why there are no emails from any employee of the Pequot affiliated hedge funds to any Broadview employee. To what extent have you attempted to recover these emails from backup tapes?

Regarding the testimony of Broadview employees, more than likely, they will be taken in California. It may also be necessary to take testimony from someone knowledgeable about Broadview's document retention policy.

I suggest that we set a time soon to discuss this matter

Sincerely,

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

From: Clavere, Eilleen [mailto[redacted]
Sent: Wednesday, January 05, 2005 8:23 PM
T : 'AguirreG@sec.gov'
Cc: Guo, Xinxin
Subject: Trading in Certain Securities HO-9818

Mr. Aguirre: I am confirming our attempt to reach you yesterday to (1) discuss Broadview's document retention policy prior to Jefferies acquisition of its business; and (2) get windows of days for the testimony of Broadview/Jefferies employees. Please be aware that I know of one witness, Mike Kelly, is traveling extensively in January and February. So, we would like to explore dates and lock them in as soon as possible.

I am out of the office Thursday, Friday and possibly Monday tending to a family member who is having surgery. You may communicate with XinXin Guo by email. In any event, I hope to speak to you on my return on 1/11/05. If you wish to leave a voice mail you may do so but I will not have access to email. thanks. eilleen.

Eilleen M. Clavere
Kirkpatrick & Lockhart Nicholson Graham LLP
San Francisco, CA
tel.[redacted]
fax[redacted]
e-mail[redacted]

This electronic message contains information from the law firm of Kirkpatrick & Lockhart Nicholson Graham LLP that may be privileged and confidential. The information is intended to be for the use of the addressee only. If you are not the addressee, note that any disclosure, copy, distribution or use of the contents of this message is prohibited.

From: Eichner, Jim
Sent: Thursday, June 09, 2005 4:26 PM
To: Aguirre, Gary J.
Subject: RE: is the aguirre quoted in the clips about cox related to you?

I guess the two apples don't fall far from each other (and presumably not to far from the tree).

Of course, I was joking about the name change (although using an alias when Pequot goes to the commission can't hurt ☺)

From: Aguirre, Gary J.
Sent: Thursday, June 09, 2005 4:23 PM
To: Eichner, Jim
Subject: RE: is the aguirre quoted in the clips about cox related to you?

Some people have to have the balls to say the truth.

From: Eichner, Jim
Sent: Thursday, June 09, 2005 4:22 PM
To: Aguirre, Gary J.
Subject: RE: is the aguirre quoted in the clips about cox related to you?

You might want to change your name when the new Chairman arrives.

From: Aguirre, Gary J.
Sent: Thursday, June 09, 2005 4:20 PM
To: Eichner, Jim
Subject: RE: is the aguirre quoted in the clips about cox related to you?

We shared the same parents.

From: Eichner, Jim
Sent: Thursday, June 09, 2005 3:40 PM
To: Aguirre, Gary J.
Subject: is the aguirre quoted in the clips about cox related to you?

From: Aguirre, Gary J.
Sent: Friday, August 26, 2005 9:34 AM
To: Hanson, Robert
Subject: RE: Benton's Testimony

See below.

From: Hanson, Robert
Sent: Friday, August 26, 2005 8:43 AM
To: Aguirre, Gary J.
Subject: FW: Benton's Testimony

Gary,

Can I call Andor and ask them to respond to our subpoena? Sure. Is there anything they have produced to date [no] and is there any correspondence between us and Andor worth reviewing before the call? [just a letter from Benjamin, but not pertinent] I'd like to call today now that we all agree.

Thanks,

Bob

From: Kreitman, Mark J.
Sent: Wednesday, August 24, 2005 2:32 PM
To: Hanson, Robert
Subject: FW: Benton's Testimony

Seems like a plan re this question.

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 2:24 PM
To: Kreitman, Mark J.
Subject: RE: Benton's Testimony

Please see my comments below.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

From: Kreitman, Mark J.
Sent: Wednesday, August 24, 2005 1:36 PM

To: Aguirre, Gary J.; Hanson, Robert
Subject: RE: Benton's Testimony

Seems to me the agreement between Andor and Pequot is a matter for them to resolve.
That has been exactly my position since the beginning.

Why don't we simply ask Andor to respond to our subpoena.
I agree, let's do it.

If they assert privilege, we'll inquire as to the basis and go from there.
I agree, let's do it. Also my position since the beginning.

I'm interested to see the authorities that take an approach different from Nancy's.

I am not sure I understand you point. I have no problem with the legal analysis in Nancy's memo. She found two cases that articulate the principle that a parent can enter into an agreement with its subsidiary precluding the latter from waiving privileged documents. However, it is a huge leap to go from that abstract principle to the conclusion that Pequot's agreement with Andor precludes the latter from waiving the privilege. Nancy recognized as much in her memo: "Reasonable protective arrangements ***could*** reasonably include PCM not permitting Andor to waive the joint attorney-client privilege. At receipt of the subpoena, pursuant to the Separation Agreement, Andor should have notified PCM and PCM would have been free to request such arrangements. ***However confidentiality provisions have not been litigated in this context, so it is not certain what language would be sufficient to change the general rule (emphasis added).***" From a quick review of the cases, the applicable burdens of proof, and recalling numerous cases where I have litigated and applied the rules of construction (also done in my Enron article), my take is that Audrey would have an uphill fight on this one. Further, the idea that Pequot can prevent Andor from

– complying with the subpoena is a theory that Benjamin does not buy, even when Jim E suggested it to him.

With respect to scheduling matters, these kinds of misunderstandings are common, shouldn't be an occasion for personal umbrage on anyone's part. Let's just schedule to suit everyone's convenience, apologize to the effect that we've inconvenienced anyone. Make sense?
OK with me.

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 1:25 PM
To: Hanson, Robert; Kreitman, Mark J.
Subject: RE: Benton's Testimony

Mark/Bob,

Two points:

Jim did not tell me "from the get go" that he had testimony on the 14th. He told me he had testimony scheduled during the week of the 12th, but did not specify the dates. I tried to accommodate his schedule until Jim Benjamin, Andor's attorney, said Benton was not available during the week of the 5th, when we had requested his testimony. I went off the line to ask Jim E if we could go ahead during the week of the 12th. He agreed and made no mention that we should avoid the 14th or 15th. I went back on line and told Benjamin he could give us any date during the week of the 12th. Jim said nothing. Had he raised the issue, I would have limited the dates by Jim's availability. When Benjamin came back later with the 14th, Jim said he had an examination on that date. We went back to Benjamin a couple more times, finally pressing him for the 15th, which he agreed to do by rescheduling his calendar. Then, Jim said he had testimony on that day as well. Hence, we now have to go back for another change only because we are cannot get our own calendars straight. I do not like handling any defense counsel this way, particularly one who is very cooperative and can provide us with extremely valuable information if he has confidence in us. In short, I believe our dealings with Benjamin were counterproductive to our goals. I do not understand why Jim did not speak out during the break I took in the conversation with Benjamin: "The week of September 12 is OK except for the 14 and 15, when I have examinations." He could also have done this when I went back on the line with Benjamin. Instead, we learned about his examination on the 14th after Benjamin said he could schedule it on the 14th, and we learned about his examination on the 15th, after Benjamin said he could schedule it on the 15th. So, we are now going

back to Benjamin for yet another date simply because we cannot get our own calendars straight.

Second, I have discussed at length with Jim and Liban the importance of the scheduling sequence: Benton, Dartley, and then Samberg. Based on my understanding of the Benton-Samberg relationship, and the level of cooperation we have received thus far, I am hopeful that Benton will give us some information that will be useful during both Dartley and Samberg's testimonies.

I find this situation and the personal comments by Jim to be disturbing. Prior to the conversation referred to above with Benjamin, I repeatedly told Jim that **Benjamin was not objecting** to the production of the Andor tapes. Jim ignored my comments and repeatedly stated we have to find out Andor's position. This has moved in circles for weeks. To put the matter to rest, I put this question to Benjamin during the call with Liban and Jim E: "Jim, would you refresh me on your position on the Andor tapes?" He again said Andor had no objection and he had placed this issue in Pequot's lap, which was all he thought he had to do under the agreement. Jim E then picked up the conversation and asked Benjamin the same thing in a different way and once again got the same answer. He then went a step further: he asked Benjamin his opinion of the validity of Pequot's position. I did not object to Jim's question because I did not want to emphasize it, but I do not think it is appropriate for an SEC attorney to ask Benjamin, Andor's attorney, how he feels about the position Strauss is taking on behalf of Pequot. This suggests that we do not have confidence in our own analysis. If we do not, why should Benjamin? Further, we can assume that Benjamin and Audrey are talking and that Benjamin will pass along to Audrey the fact that we are asking him about the validity of her position. You guys make the calls, but I think this demonstrates a certain lack of confidence on our part. As you must know, Audrey is adept at exploiting weaknesses in the SEC's position.

After the call, Jim E said that Benjamin would have to take a more concrete position, something other than: "I do not object." I disagreed: Benjamin has stated that he does not object. He has even stated that his notice to Pequot discharges Andor's obligations under the agreement. Why do we believe he is obligated to take a different position? During the same discussion, I told Jim E that I had seen case law which disagreed with the premises of his legal theory. He responded "I don't believe you." In short, Jim did not seem receptive to considering my thoughts on this issue. Jim E's position is based on a fundamental misunderstanding of the law relevant to the interpretation of the Andor-Pequot agreement, but I will be making a separate memorandum on that issue when I get back.

I would like to enjoy with Jim the same relationship I have with the other members of the team, however, I am concerned that positions taken by Jim could adversely affect the outcome of this investigation.

Gary

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 9:53 AM
To: Aguirre, Gary J.; Kreitman, Mark J.
Subject: RE: Benton's Testimony

Gary/Mark,

Okay, I think I get it. I understand from talking to Jim and Liban that Jim said he would be unavailable on the 14th of September from the get go and that Jim did not object whether the testimony went forward without him. That is consistent with the string of e-mails below. Seems to me that it would make sense to schedule the testimony when you, Jim and Liban are available but if Benton's testimony is essential or necessary to go ahead and schedule it if one of you can't make it. Liban tells me we're waiting to hear from counsel to see if the testimony can be scheduled the week of the 19th.

This doesn't seem like a major issue, unless I'm missing something.

Thanks,

Bob

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 12:04 AM
To: Hanson, Robert; Kreitman, Mark J.
Subject: FW: Benton's Testimony

FY

Gary

From: Aguirre, Gary J.
Sent: Monday, August 22, 2005 11:30 AM
To: Eichner, Jim; Jama, Liban A.
Cc: Ribelin, Eric
Subject: Benton's Testimony

We are passing by what is important: how we deal with defense counsel, particularly one from whom we are trying to coax cooperation.

Last Wednesday, we called Benjamin and asked him to give us a date when Dan Benton, Samberg's former partner, was available during the week of September 5. He has been very cooperative and his testimony could be very valuable. He could also clam up and give us nothing.

When Benjamin told me the week of September 5 would not work, I went off the line to see if I could put it into the week of September 12. Jim indicated that was OK. I went back on the line and told Benjamin he could have Benton pick a day during the week of the 12. No one at our end commented. So, Benjamin contacted Benton and arranged for his client to be available on the 14. Jim then says he was taking testimony. So, Liban proposes we go back to Benjamin for a new date. Benjamin has nothing earlier. So I ask Liban to talk with Benjamin and tell him we would really appreciate if he could be flexible enough to make Benton available on the 15. Benjamin says he can do it, but he has to reschedule his calendar. Now, I find that Jim is unavailable on the 15 as well. However, as before, Jim feels it is not important for him to be there.

I suggest we call Benjamin back and tell him that the matter is going on the 14 and thank him for his cooperation.

Gary

From: Eichner, Jim
Sent: Monday, August 22, 2005 7:39 AM
To: Aguirre, Gary J.; Jama, Liban A.
Cc: Ribelin, Eric
Subject: RE: Benton's Testimony

I didn't change my mind. I was just telling you guys that I wouldn't be there on that date.
However, when I talked to Liban, he suggested we find another date.

From: Aguirre, Gary J.
Sent: Thursday, August 18, 2005 7:17 PM
To: Eichner, Jim; Jama, Liban A.
Cc: Ribelin, Eric
Subject: RE: Benton's Testimony

I'm a little confused.

Before I told Benjamin that we he could schedule it during the week of August 12, I went off line and asked you if it was OK if Liban and I handled this one. You said yes. Based on your statement, I told Benjamin he could schedule it during

this week if necessary. It would have been helpful had you spoken out at that time. Have you changed your mind?

From: Eichner, Jim
Sent: Thu 8/18/2005 11:18 AM
To: Jama, Liban A.; Aguirre, Gary J.
Subject: RE: Benton's Testimony

As we discussed, that is the day I am taking testimony in the PIPES case.

From: Jama, Liban A.
Sent: Thursday, August 18, 2005 11:17 AM
To: Aguirre, Gary J.; Eichner, Jim
Subject: Benton's Testimony

Jim Benjamin has suggested a date of September 14th (Wed.) for Benton's testimony. Please let me know if either of you have an objection to that date and I can reschedule accordingly. Thanks.

Liban A. Jama, Esq.
U.S. Securities and Exchange Commission
Division of Enforcement
100 F Street, NE
Washington, DC 20549-4628
Telephone [redacted]
Facsimile [redacted]
Email [redacted]

From: Aguirre, Gary J.
Sent: Thursday, April 14, 2005 4:10 PM
To: Murphy, Brian P.
Cc: Hanson, Robert; Chretien-Dar, Barbara C.
Subject: RE: [redacted]

Brian:

Again, thanks for your insights. I respond below to your question regarding (a)(3) where you raised it.

REDACTED

REDACTED

REDACTED

Thanks again.

Gary

From: Murphy, Brian P.
Sent: Thursday, April 14, 2005 3:33 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert; Chretien-Dar, Barbara C.
Subject: RE: [redacted]

Gary:

See my comments below. Barbara – do you agree? Thanks.

Brian

Brian P. Murphy
Division of Investment Management
Office of Enforcement Liaison
Securities and Exchange Commission

From: Aguirre, Gary J.
Sent: Thursday, April 14, 2005 12:45 PM
To: Murphy, Brian P.
Cc: Hanson, Robert; Chretien-Dar, Barbara C.
Subject: RE: [redacted]

Brian:

Thanks for your thoughtful and prompt response [redacted] do have a few questions.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

Thanks in advance,

Gary

From: Murphy, Brian P.
Sent: Thursday, April 14, 2005 10:46 AM
To: Aguirre, Gary J.
Cc: Hanson, Robert; Chretien-Dar, Barbara C.
Subject: RE: [redacted]

Gary:

REDACTED

REDACTED

Thanks
Brian.

Brian P. Murphy
Division of Investment Management
Office of Enforcement Liaison
Securities and Exchange Commission

From: Aguirre, Gary J.
Sent: Tuesday, April 12, 2005 10:57 AM
To: Murphy, Brian P.
Cc: Hanson, Robert
Subject: [redacted]

Brian:

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

Gary

From: Snively, Brian H.
Sent: Tuesday, February 08, 2005 10:12 AM
To: Aguirre, Gary J.
Cc: Pereira, Lidian B.; Kelly, Mavis A.; Breffitt, Kathryn S.
Subject: Pequot/Order Memoranda

Gary,

Just wanted to follow-up briefly on our meeting from a week or two ago. First, I indicated that I would try to find some documents here that we might have pertaining to questions that one might ask about a firm's portfolio management/investment decision-making process. As such, I have found some questions/materials that appear in certain non-public work modules we maintain. The attached document outlines some of these questions (and exam techniques). I believe you are looking to obtain a basic understanding of Pequot's investment decision-making process. I think having Pequot take you through this process and answering basic questions such as the following might be helpful:

REDACTED

REDACTED

REDACTED

These are the types of things you may want to ask. The attached document may give you some more ideas. If you want to sit down and discuss/brainstorm, I'd be glad to help.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

Please let me know if you have any questions.

Brian

<< File [redacted] >>

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From: Snively, Brian H.
Sent: Tuesday, February 08, 2005 10:12 AM
To: Aguirre, Gary J.
Cc: Pereira, Lidian B.; Kelly, Mavis A.; Breffitt, Kathryn S.
Subject: Pequot/Order Memoranda

Gary,

Just wanted to follow-up briefly on our meeting from a week or two ago. First, I indicated that I would try to find some documents here that we might have pertaining to questions that one might ask about a firm's portfolio management/investment decision-making process. As such, I have found some questions/materials that appear in certain non-public work modules we maintain. The attached document outlines some of these questions (and exam techniques). I believe you are looking to obtain a basic understanding of Pequot's investment decision-making process. I think having Pequot take you through this process and answering basic questions such as the following might be helpful:

How does the firm identify investment opportunities?

- Who conducts the research? Are research files kept on all opportunities/securities? (if so, you'll want to see these)
- How are investment decisions (buy/sell decisions) ultimately made and are there any exceptions to the normal process?
  Is there an investment committee (role of this committee should be explored - e.g. does this committee need to approve every investment decision)? Does the committee keep records of their meetings? Is there a committee head?
- Does the firm utilize an approved list of securities or a watch list of investment opportunities it is monitoring? Are there exceptions - securities purchased that are not on these lists? How often is this reviewed/updated?
  Who has ultimate authority to put securities into accounts (or take them out)? Is there one person that oversees each client's account? Explore this person's role. Can someone get something into (or out of) an account without consulting this person? How?
- Does a PM have to consult with anyone before making a decision?
- Can anyone override the entire decision-making process (i.e. make an investment decision for an client without going through normal procedures)?
- Is anyone (other than PM), in compliance or risk assessment, monitoring the portfolio? What are they monitoring for? Consider whether these documents would be of relevance to the trades you are looking at.

These are the types of things you may want to ask. The attached document may give you some more ideas. If you want to sit down and discuss/brainstorm, I'd be glad to help.

Also, regarding our conversation of who normally appears on the order memoranda [Rule 204-2(a)(3)]. I just want to reiterate that from our experience, there is normally one person ultimately responsible for the client account or fund. This person/portfolio manager is the person we normally see on the order memoranda. Asking Pequot fully about their investment decision making/portfolio management process will allow you to

better understand who is ultimately responsible for making the purchase/sale recommendations for a client's account (i.e. whether or not it is always a PM). However, it should be noted that there are probably several persons involved in the process of actually recommending securities (e.g. research analysts, investment committees). Any of these people could have received inside information. However, if there is a person who has ultimate responsibility for the client account, it is highly possible that he/she may have received this information at some point (unless there were other more compelling reasons to make unusual changes to certain holdings).

Further, regarding the order memoranda, there could be situations where a client account or fund is team managed. In these scenarios, I am not sure that we would necessarily have a problem with the firm putting 'team' or simply an individual person involved in the process on the order memoranda. I think we are generally more concerned with understanding the entire process and any documentation the firm might have in making investment decisions. However, if the firm were to put 'team' on the order memoranda, we would probably expect it to keep records of team members (and their dates of involvement with the team). Likewise, if a registrant were to put a research analyst who recommended the trade originally (and not a PM who was ultimately responsible for the account), we may not have a problem with that also depending on the circumstances. Please note that I have not personally seen either of these scenarios in my experience -- I have always seen an individuals name, generally a portfolio manager.

In the end, I think the important thing here is to understand why there are discrepancies between the two documents you have received. If Pequot's order memoranda defaults to the portfolio manager, I would at least expect that person to be able to point you in the right direction as to who was involved in the trade. If this person is not involved in recommending the trade and/or knows little or nothing about the trade, then you may have a 204-2(a)(3) deficiency (and, as examiners, we would conduct additional reviews to question the control environment at the firm). However, from our experience, order memoranda deficiencies (in particular, those deficiencies relating to who is listed as the person that recommended the trade) are not normally a high risk area for our exams; we are more interested in a general understanding of the investment decision making process and if the order memoranda deficiency is indicative of other, more severe problems.

Please let me know if you have any questions.

Brian

<< File: Sample Questions Relating to PM.ID.doc >>

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From: Simonyi, Peter
Sent: Monday, September 27, 2004 5:47 PM
To: Aguirre, Gary J.
Subject: RE: Hedge fund MUI

Thanks for the outline – I would be happy to go over our software packages and research capabilities and also introduce you to some other economists around here to discuss ideas. Anytime after Wednesday would be great.

From: Aguirre, Gary J.
Sent: Monday, September 27, 2004 5:26 PM
To: Simonyi, Peter
Cc: Cain, Charles
Subject: RE: Hedge fund MUI

Peter:

I have pasted a little background information below. I will send the CD over tomorrow by interoffice mail. Do you have access to Edgar? I was going to send over the 13F filings (Advisory Act of 1940), but I have no access key yet. If you don't have access, let me know and I'll find a way.

Maybe we can get together at your office later in the week. I would like to hear more about the software that you use.
I very much look forward to working with you on this matter and tapping into your well-known expertise.

Gary Aguirre

A) Legal theories
    1) Classic and O'Hagan style insider trading violations;
    2) Violations of Section 204A of the IAA
    3) Possible Reg. FD violations against those feeding info to Pequot (if no duty breach to issuer)
B) Current candidates for investigation.

Since 1996, there have been at least 14 SRO referrals or UAFs of suspicious trading activity by Pequot (PQ) affiliated entities. PQ's potential profit on 12 of the 14 was $9,388,000. Here's what we currently know about:

1) CSTR
    a) 7/9/03 news that deal ended
    b) PQ began to short several weeks earlier,
    c) [redacted]
2) EME Short
    a) 9/24/03, PQ shorted 58,000 shares.
    b) 10/2/02: After close, EME dropped its earnings estimates from $2.90-$3.10 to $1.65-$1.75.

c) 10/3/02: EME down $9.45, 21.7%
d) [redacted]

3) ELTE
   a) 4/3/03: news that TOC will acquire Elte.
   b) Between 11/02 and 4/03, PQ bought 178,100 shares of ELTE.
   c) [redacted]
4) RMBS
   a) 1/29/03 Blumberg news reports US appeals court rules for RMBS.
   b) Can't tell what happened because record incomplete
   c) [redacted]
5) PRX
   a) 9/12/2002 News that PRX raises 3q earnings.
   b) 9/5-9/11/02, PQ bought 291,000 shares, largest institutional buyer.
   c) [redacted]
6) KR short
   a) 12/10/01, KR, PQ sold "short" 300,000 shares of KR at $23.71.
   b) 12/10/ and 12/11/01KR dropped $4.68 on, two days fall of 19%
   c) [redacted]
7) HF
   a) PQ purchased 332,000 shares before news. When?
   b) 7/30/01. GE to acquire HF at $53.75.
   c) Potential Profit: Unknown
8) QTRN, 9/15/99, no details, [redacted]
9) APW, 5/18/99, [redacted]
10) ASMLF, 6/11/98, [redacted]
11) BTGC, 01/28/98, [redacted]
12) STAR, 8/4/97, [redacted]
13) JQF, 3/19/97, [redacted]
14) HS, 2/27/97, [redacted]
15) QLGC, 6/17/96, Potential Profit $287,183.68

C) Is there reason to believe the PQ illegal trading activity is more widespread than indicated above? Yes.

PQ's stock picking approach involves unusually frequent contacts with those who might have confidential, non-public info and thus creates an environment ripe for tips. Here's how Fortune explained Arthur Samburg's (PQ's principal) winning hedge performance:

> "Net of all fees, Pequot Partners, the $ 700 million flagship fund Samberg manages himself, has climbed an average of 27.7% a year during the past decade, which is roughly 50% better than the S&P 500 has done. What's the secret? 'Pequot Partners focuses on technology, health care, telecommunications, media, and retail stocks. Its 34-person in-house investment team makes more than 300 company visits a month. "I don't believe Wall Street research is worth a damn,"

says Samberg, who speaks from experience, having spent two years as an analyst at Kidder Peabody and 15 at Weiss Peck & Greer (emphasis added)."

From: Simonyi, Peter
Sent: Monday, September 27, 2004 1:10 PM
To: Aguirre, Gary J.
Subject: RE: Hedge fund MUI

I assumed you were going to call – I'm over in the other building – 9th and E (office 6057).

From: Aguirre, Gary J.
Sent: Monday, September 27, 2004 1:05 PM
To: Simonyi, Peter
Subject: RE: Hedge fund MUI

By the way, where are you?

From: Simonyi, Peter
Sent: Monday, September 27, 2004 12:21 PM
To: Aguirre, Gary J.
Subject: RE: Hedge fund MUI

Gary:

Anytime this afternoon – after 1:15.

Peter

From: Aguirre, Gary J.
Sent: Monday, September 27, 2004 12:04 PM
To: Simonyi, Peter
Subject: Hedge fund MUI

Peter:

Richard Grime and Charles Cain have suggested that I speak with you regarding the above. It will probably take about 20 minutes when and if you have the time.

Any time soon?

Thanks,

Gary Aguirre

From: Caffrey, Andrew
Sent: Thursday, November 04, 2004 1:42 PM
To: Aguirre, Gary J.
Cc: Simonyi, Peter
Subject: Pequot Results

Hi Gary,

I have attached a zipped Excel file with the Pequot results discussed below. The relevant fields in the table are highlighted and have notes explaining their meaning.

I'm open to meet or chat just about anytime, once you've looked at the numbers.

Andrew

From: Aguirre, Gary J.
Sent: Wednesday, November 03, 2004 4:36 PM
To: Caffrey, Andrew
Subject: RE: Pequot

Thanks for the update.

From: Caffrey, Andrew
Sent: Wednesday, November 03, 2004 4:23 PM
To: Aguirre, Gary J.
Subject: RE: Pequot

Hi Gary,

I do have some results; however I've identified a couple of problems since I spoke with Peter. I'm going through the numbers again and will send you what I have tomorrow.

REDACTED

Until tomorrow,
Andrew Caffrey

From: Aguirre, Gary J.
Sent: Wednesday, November 03, 2004 3:49 PM

To: Caffrey, Andrew
Subject: Pequot

Hi Andrew

Peter says you have some work I should see on the above. Could you email it too me and then we can set a time to discuss.

Thanks in advance.

Gary Aguirre

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY AGUIRRE Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION, Defendant.	)	Case No. 1:02-cv-1260-ESH

DECLARATION OF SUSAN MARKEL

I, Susan Markel, declare as follows:

1. I am the Chief Accountant for the Commission's Division of Enforcement ("Division"). That position is a Senior Officer position. I have been the Chief Accountant since June 2003, and I have been employed by the Commission since May 1994.

2. In 2005, I coordinated the deliberations of the compensation committee for the Division. The compensation committee was composed of Senior Officers from the Division and under the Commission's Performance Management Process was responsible for comparing employee contributions and assessing the accomplishments of employees. The committee's process culminated in a recommendation to the Director of the Division as to the number of steps each employee should receive as merit pay. Employees could receive up to three steps as merit pay.

3. During the meeting of the compensation committee, the members of the compensation committee used a spreadsheet that listed all the non-supervisory employees in the Division, along with information about their supervisors, their position, their current grade and

step, and for recent employees the date they started employment at the Commission. Gary Aguirre is listed on that spreadsheet.

4. The spreadsheet included a column showing whether each employee's supervisor had provided a summary of the employee's contributions as well as columns showing the recommendations that each employee's immediate supervisor had made regarding the employee's contributions. For each employee, supervisors could say that the employee had (1) made contributions of the highest quality, (2) made contributions of high quality, (3) made contributions of quality, or (4) made no significant contribution beyond an acceptable level of performance.

5. The spreadsheet also shows the number of steps each employee received in 2004 and has columns for the recommendations of the compensation committee. For all but the final version of the spreadsheet approved by the Director of the Division, those columns reflect the deliberations of the compensation committee. The spreadsheet also contains statistics at the end that show how many employees received different numbers of steps, and that information could be broken down by supervisor. The statistics aided the committee's deliberations as it sought an appropriate distribution of steps.

6. After the compensation committee finished its deliberations, it made a recommendation to the Director of the Division regarding the merit steps each employee should receive. After the Director reviewed the spreadsheet and we made whatever adjustments were necessary following her review, we sent a final version of the spreadsheet to the Commission's Office of Human Resources.

7. After the compensation committee met, I obtained draft spreadsheets from some

committee members. I have nineteen copies of the spreadsheet (several of which are identical) in addition to the final spreadsheet sent to the Office of Human Resources. Some of the drafts do not have all the columns printed out, and the final version, in particular, omits information about supervisory recommendations. Also, some of the drafts have some rows highlighted to show employees that warranted some extra attention. Mr. Aguirre's name is not highlighted in any of the spreadsheets.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 8, 2007 in Washington, D.C.

Susan Markel

From: Aguirre, Gary J.
Sent: Tuesday, May 31, 2005 4:55 PM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: Some missing tapes found?

Jim Benjamin of Akin Gump represents Andor, the entity that Dan Benton, Samburg's protégé, created when he broke from Pequot. Benjamin told me that Andor has two of Pequot's backup tapes dated June and July of 2001, the very months Samburg would have been considering Heller Financial. Jim seems cooperative at this point. Do we want the tapes or just e-mails? Since Pequot gave tapes to Andor (a different entity), we could take the position that Pequot waived any privilege. Jason Ivarone is checking out whether we could retrieve e-mails or whether it would have to go to vendor. We could also seek all e-mails if Andor retrieved e-mails from the tapes.

There seem to be a shortage of Samberg e-mails for July. He is averaging approximately 2,000 e-mails a month but we have only 837 for July 2001. This makes no sense, because Pequot was it largest at this point and there was much going on.

From: Aguirre, Gary J.
Sent: Thursday, June 02, 2005 2:54 PM
To: Kreitman, Mark J.
Subject: Pequot: Missing tapes update and question

Mark:

Bob suggested I pass this one by you.

I questioned Pequot's IT chief about missing tapes during his testimony on 5/4. A few days later, Audrey called and said she spoke with Andor, formed by Samberg's protégé Benton in 2001, when Benton broke away from Pequot in 2001. Audrey told me Andor's staff had taken no Pequot tapes when they left Pequot in 9/2001. This did not smell right. A few days later, I subpoenaed Pequot e-mails and backup tapes from Andor. Jim Benjamin (Akin Gump) respresents Andor and has been very cooperative. He tells me Andor has 21 Pequot tapes, including two for June and July 2001, the key period for Heller-GE.

I believe we have the following options:

1) Tell Andor to produce backup tapes per subpoena, retrieve e-mails and possibly surprise Samberg with e-mails he hasn't seen; [redacted]: Audrey screams about attorney-client, claiming Andor was split off; could also be expensive to do retrieval/forensics on tapes.
2) Audrey has offered to have Pequot pay for national forensic/e-mail retrieval firm to recover e-mails, FF reviews them, and Audrey produces to us; [redacted]: snail slow production; specious assertion of privilege;
3) My suggestion: try to get Audrey to offer # 2 above, with waiver of privilege if we agree not to go via #1. [redacted] we don't surprise Samberg.

Your call?

Wildcard: Has Pequot waived attorney client privilege by giving backup tapes to Andor, a third party? My take: presumptively yes.

Gary

From: Aguirre, Gary J.
Sent: Friday, June 03, 2005 10:30 AM
To: Hanson, Robert
Subject: RE: Need Mark's input on Andor tape issue this am.

Was talking to Mark when your call came in. Mark has some concern about privilege issue. Jim's researching this. I'm thinking we should hear what Audrey has to say about privilege because if she claims it and she's right, our taking tapes is not an option.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

-----Original Message-----
From: Hanson, Robert
Sent: Friday, June 03, 2005 10:20 AM
To: Aguirre, Gary J.
Subject: Re: Need Mark's input on Andor tape issue this am.

I think you have to punt until we figure out whether we can (pracrically speaking) do the job ourselves. No need to call mark if the decision can be put off
---
Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. [redacted]
To: Hanson, Robert [redacted]
Sent: Fri Jun 03 10:03:45 2005
Subject: FW: Need Mark's input on Andor tape issue this am.

Jason has been briefing David on this issue.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone [redacted]
Fax [redacted]
mailto [redacted]
-----Original Message-----
From: Hanson, Robert
Sent: Friday, June 03, 2005 10:02 AM
To: Aguirre, Gary J.
Subject: Re: Need Mark's input on Andor tape issue this am.

Call mark at home. Don't know how we would be able to do in-house but dave w should be consulted.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: Aguirre, Gary J. [redacted]
To: Hanson, Robert
Sent: Fri Jun 03 07:29:24 2005
Subject: Need Mark's input on Andor tape issue this am.

Bob:

Audrey and I are scheduled to talk this morning at 11 am about several issues, including what to do about PQ tapes at Andor. Mark will want your input on how to handle. Given various dynamics now at play, I think Audrey may offer #3 below rather than risk #1. Perhaps we can get Mark's attention between 10 and 11?

Gary

From: Aguirre, Gary J.
Sent: Thursday, June 02, 2005 2:54 PM
To: Kreitman, Mark J.
Subject: Pequot: Missing tapes update and quesion

Mark:

Bob suggested I pass this one by you.

I questioned Pequot's IT chief about missing tapes during his testimony on 5/4. A few days later, Audrey called and said she spoke with Andor, formed by Samberg's protégé Benton in 2001, when Benton broke away from Pequot in 2001. Audrey told me Andor's staff had taken no Pequot tapes when they left Pequot in 9/2001. This did not smell right. A few days later, I subpoenaed Pequot e-mails and backup tapes from Andor. Jim Benjamin (Akin Gump) respresents Andor and has been very cooperative. He tells me Andor has 21 Pequot tapes, including two for June and July 2001, the key period for Heller-GE.

I believe we have the following options:

1) Tell Andor to produce backup tapes per subpoena, retrieve e-mails and possibly surprise Samberg with e-mails he hasn't seen; downside: Audrey screams about attorney-client, claiming Andor was split off; could also be expensive to do retrieval/forensics on tapes.

2) Audrey has offered to have Pequot pay for national forensic/e-mail retrieval firm to recover e-mails, PP reviews them, and Audrey produces to us; downside: snail slow production; specious assertion of privilege;

3) My suggestion: try to get Audrey to offer # 2 above, with waiver of privilege if we agree not to go via #1. Downside: we don't surprise Samberg.

Your call?

Wildcard: Has Pequot waived attorney client privilege by giving backup tapes to Andor, a third party? My take: presumptively yes.

Gary

From: Eichner, Jim
Sent: Friday, June 03, 2005 3:56 PM
To: Kreitman, Mark J.; Aguirre, Gary J.
Cc: Hanson, Robert; Eichner, Jim
Subject: RE: Pequot: privilege issue re backup tapes

Mark-

I did some quick research on the issue of whether Pequot can assert attorney-client privilege with regard to Pequot tapes that are now in the possession of Andor. The analysis depends on the circumstances under which Andor split off from Pequot and under which Andor came to have possession of the tapes.

The basic rule is that the ability to assert or waive a company's privilege flows with control of the company. So new managers at a company installed as a result of a takeover, merger, or just normal succession can assert or waive the privilege. See In re: Grand Jury Subpoenas, 902 F.2d 244 (4th Cir. 1990). However, when a company's confidential attorney-client communications are transferred through a transfer of assets, without a transfer in control of the company, the privilege is waived as to those communications. In re: In-Store Advertising Securities Litigation, 163 F.R.D. 452 (S.D.N.Y. 1995). In addition, a parent company waives its privilege with respect to documents it leaves in the hand of a subsidiary after it sells that subsidiary. Robbins & Myers, Inc. v. J.M. Huber Corp., 2003 WL 21384304 (W.D.N.Y. May 9, 2003).

Because Andor does not control Pequot, but has possession of the tapes, it appears that the transfer would have waived Pequot's privilege with regard to the tapes. There would also be waiver of the privilege if there was no affirmative transfer, but Pequot merely left the tapes in the hands or Andor when it split off. However, because we do not know the precise circumstances through which Andor came to possess the tapes, it is hard to give a conclusive answer about whether there is any basis for Pequot to continue to assert privilege.

As we get more information about the precise circumstances of the transfer, I will see if I can find any caselaw more on point.

Jim

cc: Bob, Gary

-----Original Message-----
From: Kreitman, Mark J.
Sent: Friday, June 03, 2005 2:51 PM
To: Aguirre, Gary J.
Cc: Eichner, Jim
Subject: RE: Pequot: privilege issue re backup tapes

I'd like to see a summary of Jim's research on this point Monday. Thanks.

-----Original Message-----
From: Aguirre, Gary J.

To: Kreitman, Mark J.; Hanson, Robert; Ribelin, Eric; Eichner, Jim
Sent: 6/3/2005 2:48 PM
Subject: Pequot: privilege issue re backup tapes

I spoke with Audrey this morning with Eric and Jim present. When I asked her how she wanted to handle the tapes she proposed that the tapes go to Kroll On Track, a highly reputable firm as you may know. She wants to give more thought to the privilege issue. My take and understanding from Jim's research is that PF has an uphill battle on this one.

We will discuss again on Tuesday when Samberg's testimony is taken. All options are still on the table, including the possibility that we simply take possession of the tapes.

Since they may be forensic issues, I'm not sure how well tapes will copy.

Gary

From: Kreitman, Mark J.
Sent: Monday, June 06, 2005 5:09 PM
To: Aguirre, Gary J.; Hanson, Robert
Cc: Eichner, Jim
Subject: RE: Pequot backup tapes in the possession of Andor

Sounds reasonable. Jim's research gives us a good faith basis for this assertion. I assume the Andor tapes (and anything else we may want from they are under subpoena).

From: Aguirre, Gary J.
Sent: Monday, June 06, 2005 8:25 AM
To: Kreitman, Mark J.; Hanson, Robert
Cc: Eichner, Jim
Subject: Pequot backup tapes in the possession of Andor

Mark:

I do not see a factual theory that would allow Pequot to invoke the attorney-client privilege. The draft of separation agreement between Samberg and Benton provided for the formation of Andor Capital as a subsidiary to Pequot, the contribution by Pequot assets to Andor, and the spinoff of Andor. According to Andor's attorney, Jim Benjamin of Akin Gump, Andor began operations on October 1 with its employees accessing servers that contained info taken from Pequot. No one has suggested that Andor took the electronic data on its servers or the Pequot backup tapes without Pequot's consent. If they were, you can count on Audrey to tell us that. There was no "joint defense" because there was no litigation. The only thing Audrey told me so far was a lie; she told me three weeks ago Andor had no tapes. I also suspect that Andor's decision in February 2005--four years after its start up--to begin destroying Pequot backup tapes is too much of a coincidence.

The law is clear that there is no privilege under these circumstances. As Jim pointed out in his research, "new managers at a company installed as a result of a takeover, merger, or just normal succession can assert or waive the privilege." This same principle applies to a subsidiary divesture as was done here. *Medcom Holding Co. v. Baxter Travenol Lab.*, 120 F.R.D. 66 (ED Ill. 1988)

Audrey told me on Friday she would let me know tomorrow whether PCM will assert the privilege.

Gary

From: Aguirre, Gary J.
Sent: Tuesday, August 23, 2005 11:57 PM
To: Hanson, Robert; Kreitman, Mark J.
Subject: Improving our working relationship

I have not had problems with the numerous staff members who have worked on Pequot since the beginning, including the paralegal from the last unit, Hilton Foster, and staff from Market Surveillance, IM, IT, OEA, and OC. In fact, I believe I have established rapport with all of the involved staff members.

The first staff problem has arisen with someone you placed on the team. Jim has not only instinctively disagreed with most positions I have taken in Pequot but has also made offensive personal comments. I passed them off at first, but they continue. I mention two in my e-mail below. My efforts to work this out with Jim directly have been rebuffed.

This undermines the sense of teamwork that I and others have brought to Pequot.

Do you have any idea why this would be occurring?

Gary

From: Aguirre, Gary J.
Sent: Tuesday, August 23, 2005 11:27 PM
To: Eichner, Jim
Cc: Hanson, Robert
Subject: Improving our working relationship

Jim:

Are you implying that I have overlooked the task at hand or that we are representing the same client? If so, please be specific about the circumstances upon which you base these comments.

Your comments are personal. Your joke that I should change my name because my brother spoke out publicly against the appointment of Chairman Cox was inappropriate. Your statement "I don't believe you" when I told you case law differed from your assumptions borders on insult.

You have once again passed these comments off lightly. Unfortunately, this suggests you are not aware of your behavior.

Gary.

From: Eichner, Jim
Sent: Tuesday, August 23, 2005 7:39 AM
To: Aguirre, Gary J.
Subject: RE: Improving our working relationship

Gary-

I don't think it is productive to rehash the past by email.

I think if we both keep focused on the task at hand and always keep in mind that we are on the same side we will work together fine.

Jim

From: Aguirre, Gary J.
Sent: Monday, August 22, 2005 1:50 PM
To: Eichner, Jim
Subject: Improving our working relationship

Jim:

I am concerned about the lack of open, meaningful communication between the two of us on the Pequot investigation. This is the second e-mail today on the same subject. I am hoping to stimulate a discussion that will improve our ability to communicate when I return. I am open to any positive suggestions you would like to make.

I have expressed my opinion that our research on the Andor backup tapes is incomplete; we only have case law that a parent may enter into an agreement with a subsidiary barring the latter from waiving the attorney-client privilege under some circumstances. The tougher issue has not been tackled: whether the Pequot-Andor agreement allows Pequot to veto Andor's release of documents to the SEC. I suggested that there were rules of construction, relevant policy expressed in the cases, and presumptions that would have to be applied to the facts before we could reach this conclusion.

I understand you vigorously disagree with my analysis above. That's healthy; it leads to dialogue that may produce a correct SEC stance on this issue.

But at times, your vigorous opposition seemed to go further. For example, I told you that I saw case law that differed from a premise in your position. Your reply: "I do not believe you." That goes beyond healthy disagreement and borders on insult.

Another involves our discussion with Benjamin. Since you repeatedly questioned my statement to you that Benjamin was not asserting an objection, I asked him during the phone conversation if he would refresh me regarding Andor's position. He replied by saying, and I am paraphrasing, that this was Pequot's call and that Andor was not taking a position. I do not recall your exact words, but you asked Benjamin again pretty much the same question I had asked him and he gave the same response. You then asked him what his opinion was on the validity of Pequot's position.

After the call, you stated your view that Benjamin would have to take a more concrete position that he had. I disagree. I also wonder whether your statement is the result of the heated argument we were having at that time. I think it could be very damaging to push on Benjamin in this way. I hope you give this further thought.

Gary

From: Kreitman, Mark J.
Sent: Wednesday, August 24, 2005 1:36 PM
To: Aguirre, Gary J.; Hanson, Robert
Subject: RE: Benton's Testimony

Seems to me the agreement between Andor and Pequot is a matter for them to resolve. Why don't we simply ask Andor to respond to our subpoena. If they assert privilege, we'll inquire as to the basis and go from there. I'm interested to see the authorities that take an approach different from Nancy's. With respect to scheduling matters, these kinds of misunderstandings are common, shouldn't be an occasion for personal umbrage on anyone's part. Let's just schedule to suit everyone's convenience, apologize to the effect that we've inconvenienced anyone. Make sense?

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 1:25 PM
To: Hanson, Robert; Kreitman, Mark J.
Subject: RE: Benton's Testimony

Mark/Bob,

Two points:

Jim did not tell me "from the get go" that he had testimony on the 14th. He told me he had testimony scheduled during the week of the 12th, but did not specify the dates. I tried to accommodate his schedule until Jim Benjamin, Andor's attorney, said Benton was not available during the week of the 5th, when we had requested his testimony. I went off the line to ask Jim B if we could go ahead during the week of the 12th. He agreed and made no mention that we should avoid the 14th or 15th. I went back on line and told Benjamin he could give us any date during the week of the 12th. Jim said nothing. Had he raised the issue, I would have limited the dates by Jim's availability. When Benjamin came back later with the 14th, Jim said he had an examination on that date. We went back to Benjamin a couple more times, finally pressing him for the 15th, which he agreed to do by rescheduling his calendar. Then, Jim said he had testimony on that day as well. Hence, we now have to go back for another change only because we are cannot get our own calendars straight. I do not like handling any defense counsel this way, particularly one who is very cooperative and can provide us with extremely valuable information if he has confidence in us. In short, I believe our dealings with Benjamin were counterproductive to our goals. I do not understand why Jim did not speak out during the break I took in the conversation with Benjamin: "The week of September 12 is OK except for the 14 and 15, when I have examinations." He could also have done this when I went back on the line with Benjamin. Instead, we learned about his examination on the 14th after Benjamin said he could schedule it on the 14th, and we learned about his examination on the 15th, after Benjamin said he could schedule it on the 15th. So, we are now going

back to Benjamin for yet another date simply because we cannot get our own calendars straight.

Second, I have discussed at length with Jim and Liban the importance of the scheduling sequence: Benton, Dartley, and then Samberg. Based on my understanding of the Benton-Samberg relationship, and the level of cooperation we have received thus far, I am hopeful that Benton will give us some information that will be useful during both Dartley and Samberg's testimonies.

I find this situation and the personal comments by Jim to be disturbing. Prior to the conversation referred to above with Benjamin, I repeatedly told Jim that **Benjamin was not objecting** to the production of the Andor tapes. Jim ignored my comments and repeatedly stated we have to find out Andor's position. This has moved in circles for weeks. To put the matter to rest, I put this question to Benjamin during the call with Liban and Jim E: "Jim, would you refresh me on your position on the Andor tapes?" He again said Andor had no objection and he had placed this issue in Pequot's lap, which was all he thought he had to do under the agreement. Jim E then picked up the conversation and asked Benjamin the same thing in a different way and once again got the same answer. He then went a step further: he asked Benjamin his opinion of the validity of Pequot's position. I did not object to Jim's question because I did not want to emphasize it, but I do not think it is appropriate for an SEC attorney to ask Benjamin, Andor's attorney, how he feels about the position Strauss is taking on behalf of Pequot. This suggests that we do not have confidence in our own analysis. If we do not, why should Benjamin? Further, we can assume that Benjamin and Audrey are talking and that Benjamin will pass along to Audrey the fact that we are asking him about the validity of her position. You guys make the calls, but I think this demonstrates a certain lack of confidence on our part. As you must know, Audrey is adept at exploiting weaknesses in the SEC's position.

After the call, Jim E said that Benjamin would have to take a more concrete position, something other than: "I do not object." I disagreed: Benjamin has stated that he does not object. He has even stated that his notice to Pequot discharges Andor's obligations under the agreement. Why do we believe he is obligated to take a different position? During the same discussion, I told Jim E that I had seen case law which disagreed with the premises of his legal theory. He responded "I don't believe you." In short, Jim did not seem receptive to considering my thoughts on this issue. Jim E's position is based on a fundamental misunderstanding of the law relevant to the interpretation of the Andor-Pequot agreement, but I will be making a separate memorandum on that issue when I get back.

I would like to enjoy with Jim the same relationship I have with the other members of the team, however, I am concerned that positions taken by Jim could adversely affect the outcome of this investigation.

Gary

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 9:53 AM
To: Aguirre, Gary J.; Kreitman, Mark J.
Subject: RE: Benton's Testimony

Gary/Mark,

Okay, I think I get it. I understand from talking to Jim and Liban that Jim said he would be unavailable on the 14th of September from the get go and that Jim did not object whether the testimony went forward without him. That is consistent with the string of e-mails below. Seems to me that it would make sense to schedule the testimony when you, Jim and Liban are available but if Benton's testimony is essential or necessary to go ahead and schedule it if one of you can't make it. Liban tells me we're waiting to hear from counsel to see if the testimony can be scheduled the week of the 19th.

This doesn't seem like a major issue, unless I'm missing something.

Thanks,

Bob

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 12:04 AM
To: Hanson, Robert; Kreitman, Mark J.
Subject: FW: Benton's Testimony

FY

Gary

From: Aguirre, Gary J.
Sent: Monday, August 22, 2005 11:30 AM
To: Eichner, Jim; Jama, Liban A.
Cc: Ribelin, Eric
Subject: Benton's Testimony

We are passing by what is important: how we deal with defense counsel, particularly one from whom we are trying to coax cooperation.

Last Wednesday, we called Benjamin and asked him to give us a date when Dan Benton, Samberg's former partner, was available during the week of September 5. He has been very cooperative and his testimony could be very valuable. He could also clam up and give us nothing.

When Benjamin told me the week of September 5 would not work, I went off the line to see if I could put it into the week of September 12. Jim indicated that was OK. I went back on the line and told Benjamin he could have Benton pick a day during the week of the 12. No one at our end commented. So, Benjamin contacted Benton and arranged for his client to be available on the 14. Jim then says he was taking testimony. So, Liban proposes we go back to Benjamin for a new date. Benjamin has nothing earlier. So I ask Liban to talk with Benjamin and tell him we would really appreciate if he could be flexible enough to make Benton available on the 15. Benjamin says he can do it, but he has to reschedule his calendar. Now, I find that Jim is unavailable on the 15 as well. However, as before, Jim feels it is not important for him to be there.

I suggest we call Benjamin back and tell him that the matter is going on the 14 and thank him for his cooperation.

Gary

From: Eichner, Jim
Sent: Monday, August 22, 2005 7:39 AM
To: Aguirre, Gary J.; Jama, Liban A.
Cc: Ribelin, Eric
Subject: RE: Benton's Testimony

I didn't change my mind. I was just telling you guys that I wouldn't be there on that date. However, when I talked to Liban, he suggested we find another date.

From: Aguirre, Gary J.
Sent: Thursday, August 18, 2005 7:17 PM
To: Eichner, Jim; Jama, Liban A.
Cc: Ribelin, Eric
Subject: RE: Benton's Testimony

I'm a little confused.

Before I told Benjamin that we he could schedule it during the week of August 12, I went off line and asked you if it was OK if Liban and I handled this one. You said yes. Based on your statement, I told Benjamin he could schedule it during this week if necessary. It would have been helpful had you spoken out at that time. Have you changed your mind?

From: Eichner, Jim
Sent: Thu 8/18/2005 11:18 AM
To: Jama, Liban A.; Aguirre, Gary J.
Subject: RE: Benton's Testimony

As we discussed, that is the day I am taking testimony in the PIPES case.

From: Jama, Liban A.
Sent: Thursday, August 18, 2005 11:17 AM
To: Aguirre, Gary J.; Eichner, Jim
Subject: Benton's Testimony

Jim Benjamin has suggested a date of September 14th (Wed.) for Benton's testimony. Please let me know if either of you have an objection to that date and I can reschedule accordingly. Thanks.

Liban A. Jama, Esq.
U.S. Securities and Exchange Commission
Division of Enforcement
100 F Street, NE
Washington, DC 20549-4628
Telephone: [redacted]
Facsimile: [redacted]
Email: [redacted]

From: Hanson, Robert
Sent: Monday, June 20, 2005 7:55 AM
To: Aguirre, Gary J.
Subject: RE: A Pequot suggestion

Might be helpful to clearly lay out what needs to be done on the case and who would do it. Let's discuss before we present to Mark since he's going to want to get my input anyway. Your nos. 1, 2, 5 and 6 are not as relevant as the others in my view for the insider piece of the case.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 7:17 AM
To: Kreitman, Mark J.
Cc: Hanson, Robert
Subject: A Pequot suggestion

Mark:

You were considering the possibility of Liban putting in some time on Pequot. I offer below some thoughts below why it might make sense:

1) **His securities background**: a big plus for the case.

2) **His lack of litigation experience**: a good reason for him to work with me;

3) **Second person on phone calls and testimony**: Someone must do this; it was spilt up between Hilton and Eric; Hilton is gone and Eric is not always available; also, it's an excellent way for Liban to get familiar with the players and current issues in the case;

4) **Illness, vacation, or I get "hit by a truck"**: he could step in on an interim basis; otherwise possible nightmare for Bob;

5) **He is motivated**: Since sitting in on Samberg testimony, he has wanted to work on Pequot; that motivation would accelerate his learning curve;

6) **Justification of resource allocation**: there are about 100 attorneys on the other side of this case; Market Surveillance and Jim are focused on wash/short trading and thus are not much help on this aspect of the case; Nancy leaves in six weeks;

7) **Last but not least**: with his securities background, motivation, and 3.7 million e-mails, he may help break the case.

Anyway, thanks for considering the suggestion.

Gary

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F ST., N.E.
WASHINGTON, D.C. 20549

WRITER'S DIRECT DIAL LINE
[redacted]

May 31, 2005

Via Facsimile t[redacted]nd via Regular Mail

Audrey Strauss, Esq.
Fried, Frank Harris, Shriver & Jacobson
One New York Plaza
New York, NY 10004

Re: In the Matter of Trading in Certain Securities; MHO-9818

Dear Ms. Strauss:

Based on our discussions over the past two weeks, I confirm below my understanding of the process you have proposed for your client, Pequot Capital Management ("PCM"), to produce the e-mails called for by our outstanding subpoenas served on February 7 and March 22. Nothing in this letter or our recent discussions 1) limits the scope of our subpoenas, 2) relieves PCM from its obligations to fully comply with all terms of our outstanding subpoenas, or 3) waives the Commission's authority to proceed with any appropriate judicial and/or administrative remedy to compel the production of the documents described in such subpoenas. In its discretion, the staff may give notice at any time withdrawing its consent that PCM may produce e-mails in the manner described below. By this letter, the staff merely agrees to accept the production of e-mails in the manner set forth below so long as such procedures are, in staff's view, advancing the investigation of this matter.

March 22 Subpoena.

Except as specified below, PCM will promptly produce all unprivileged e-mails responsive to the staff's March 22 subpoena. On or before June 8, PCM will provide Staff with access through an Iconect platform ("SEC Access") to a database maintained by On Site. You have informed us that all responsive e-mails of specified PCM employees ("Specified Employees") will be available to Staff through the SEC Access by June 8 with the following exceptions: 1) the e-mails in the custodian folders of Mr. Hirsch; Ms. Vanden-Barth, and Mr. Dauchot at this time; 2) e-mails which your firm reasonably believes may be protected by PCM's attorney-client privilege and are being temporarily withheld for a prompt determination whether such privilege applies; and 3) e-mails of Mr. Cutler which are also undergoing a similar privilege review. The Specified Employees are 1) those identified by name in Appendix B to the March 22 subpoena and 2) any other person identified by PCM or its attorneys, as of this date, who meet the criteria set forth in Request C of our letter of November 24, 2004.

Additionally, within the next one hundred and twenty days, PCM shall provide all responsive e-mails responsive to staff's March 22 subpoena by CD-Rom or DVD in accordance with SEC Standards specified in subsection A.3 of said subpoena, except 1) e-mails in the

custodian folders of the three PCM employees identified above and 2) e-mails protected by PCM's attorney-client privilege. Staff will return any written or electronic communications which are protected by PCM's attorney-client privilege upon the valid assertion in writing by PCM of such privilege in relation to a specific e-mail or when the privileged status of any such e-mail otherwise becomes known to Staff.

Security and Access Issues Involving SEC Database.

Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank") and PCM have agreed that no neither PCM nor Fried Frank employees shall have access to any information relating to the manner in which Staff accesses, downloads or otherwise uses any data maintained by On Site. It is further understood that obtaining, communicating or receiving any information regarding Staff's access, downloading, printing, or other use by Staff of the database maintained by On Site will be deemed the equivalent of unlawfully gaining access and utilizing confidential electronic information from the Commission's internal database systems.

On Site currently maintains a server (On Site Server) containing all PCM e-mails in native format. Fried Frank staff has access to the On Site Server through a separate server (Fried Frank Server) on which Fried Frank's work-product is stored. Fried Frank has informed Staff that On Site will provide written assurances that On Site will maintain Staff's work product on a different server (SEC Server) with a different IP address than the Fried Frank Server. On Site will further provide written assurances to Staff that 1) only three Iconect administrators will have access to the SEC Server, 2) none of the of administrators who have access to the Fried Frank Server will have access to the SEC Server, 3) On Site will cause the apparatus that tracks Staff's use of the SEC Server or Staff's use of the On Site Server to be non-operational, and 4) and any network administrator who has access to any of the above servers will not have access to Staff's work product. Fried Frank will arrange with On Site for a minimum of ten Staff members to have access through the SEC Access to the On Site Server and the e-mails stored thereon at no expense to the Commission for the duration of this investigation. Fried Frank, PCM and On Site shall inform their respective employees who are working on this matter, or hereafter work on this matter, of the representations set forth in this paragraph.

February 7 Subpoena.

We understand from our earlier discussions with your firm that all e-mails and instant messages responsive to subsection C.6 of this subpoena have been produced with the exception of those that Fried Frank reasonably believes may be subject to the attorney-client privilege. E-mails responsive to C.10 through C.14 shall be provided to Staff by posting responsive e-mails to the On Site Server utilizing the procedure described below. Once a month, Staff shall designate by letter to Fried Frank the following search criteria for 15 custodian folders: 1) the identity of the custodians whose e-mails will be searched, 2) the period of search and 3) the search terms to be used by On Site in conducting searches for responsive e-mails. Fried Frank shall produce all e-mails responsive to such criteria, with the exception of those that are privileged communications between attorney and client, within forty days of the receipt of such designation letter or as such e-mails become available for production whichever date is earlier.

Privilege Review related to Outstanding Subpoenas.

We will discuss how the privilege review process may be expedited during our conference call scheduled for June 3.

E-mails Omitted from SEC Database.

You have informed the staff that the SEC Server will not have access to a certain number of e-mails ("Omitted E-mails") that are contained in CDs previously provided to Staff, those e-mails that comprise the November "snapshot." We understand that your firm and On Site will collectively provide us with letters by June 15, explaining why the Omitted E-mails will not be on the SEC Database. Your letter of May 25 identifies the bates numbers of the Omitted E-mails and the CD-ROMS previously provided to Staff that contain the Omitted E-mails.

Missing or Inaccessible Backup Tapes.

You have previously informed us that the backup tapes for certain periods are either unavailable or do not contain accessible e-mails for periods covered by our subpoenas. Mr. Anello's letter of May 17 identifies 25 months for which accessible backup tapes are unavailable. We understand you are in the process of preparing a letter to Staff identifying the PCM employees and the relevant documents (by bates numbers) which were the source of the information contained in Mr. Anello's letter.

Instant Message Production.

We suggest that you provide the staff with a timetable during the June 3 conference call for the production of the remaining instant messages responsive to our March 22 subpoena.

Compliance related e-mails .

We suggest that you provide us with a timetable during the June 3conference call for the production of these e-mails.

Adjournment of production date of e-mails called for by our March 22 subpoena

We are adjourning the production date of the e-mails called for by the March 22 subpoena until June 8, with the exception of the e-mails Fried Frank has withheld for a privilege review. The production date for any unprivileged e-mails held for further review is June 30. The production date called for by our April 15 subpoena is adjourned to June 30.

Please feel free to contact me if you have any questions regarding my comments above.

Sincerely,

Gary J. Aguirre
Senior Counsel

February 4, 2004: Mark Kreitman phone call with Karl --- and Kevin Harnish. Eric Ribelin, Gary Aguirre and Robert Hanson also present

Subject: PCM production of e-mails.

Mark: There are software systems that can isolate e-mails that can be privileged. We can also give you assurance that if we receive any e-mails that are privileged we will return them.

Karl: Broad request, sheer volume, enormous volume. We have request for an enormous amount of e-mails. Devote a substantial amount of people. Hire contract attorneys. Physically substantial time period.

Mark: The program operates instantaneously. To the extent there is a question of law then it is Pequot putting resources into compliance. IT must be produced unless it is burdensome as a matter of law. What sounds like a reasonable in February?

Karl: Rolling production into next week, several people started. Processed after November document request. In December started adding temporary attorneys.

Mark: When did you first bring in outside people?

Karl/Kevin: Have to look. Been on a rolling basis. We are close to 25 temps of added people at Fried Frank. Some time around December people began looking. The fisrt installment will come at the end of next week. If e-mail has been reviewed, why not send them over next week?

Karl/Kevin: Have not put them into0 Concordance, this will take a couple of days.

Mark: All of us are very interested in seeing the e-mails. Looking forward to seeing them next week beginning on a rolling basis.

Regarding research materials.

Gary: All research coming in today?

Kevin: We need to double check. There will be a small amount of research next week.

From: Aguirre, Gary J.
Sent: Friday, October 22, 2004 11:31 AM
To: Cain, Charles
Subject: Pequot final

Yellow highlighting is revisions from last time or additions (IM and delayed opening) this time.

Action Memorandum Seeking
Formal Order In Insider Trading Investigation

October 22, 2004

To:	The Commission
From:	Division of Enforcement
Re:	Trading in Certain Securities, HO-9818
Recommendation:	That the Commission issue a formal order of private investigation to determine whether there have been violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder, Section 14(e) of the Exchange Act and Rule 14e-3 thereunder, and Section 204A of the Investment Advisers Act of 1940 ("Investment Advisers Act").
Action Requested By:	Summary Calendar
Prior Commission Action:	None
Source of Case:	Referral from the National Association of Securities Dealers ("NASD")New York Stock Exchange, International Stock Exchange - August 5, 2003
Other Offices Or Divisions Consulted:	Office of the General Counsel Richard A. Levine (copy provided) [redacted] Office of Compliance, Inspections and Examinations Stevenson, Karen A. (copy provided) [redacted] Office of Economic Analysis Dale, William C. Simonyi, Peter G. (copy provided) [redacted] [redacted] Chretien-Dar, Barbara C. (copy provided) [redacted]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F St. N.E.
WASHINGTON, D.C. 20549-0800

WRITER'S DIRECT DIAL LINE
[redacted]

May 31, 2005

Via Facsimile[redacted] and via Federal Express

Custodian of Records
Reuters Group PLC
c/o Thomas S. Kim
3 Times Square
New York, NY 10036

Re: In the Matter of Trading in Certain Securities; MHO-9818

Dear Mr. Kim:

In accordance with our telephone call on May 24, you may disregard the subpoena served on your custodian of records under cover of our letter of May 23. We will reissue the subpoena if we decide it is necessary to obtain the e-mails in question.

If you have any questions, please do not hesitate to call me a[redacted] Thank you for your cooperation.

Sincerely,

Gary J. Aguirre
Senior Counsel

From: Aguirre, Gary J.
Sent: Monday, March 14, 2005 9:22 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject: Draft letter to Fried Frank confirming Thursday's conference call

Pequot Harnisch January 14 05.doc

PQ Strauss Info Request Jan 3 05.doc

PQ Strauss 27 Dec 04 Trading Data Req

PQ Strauss 23 Dec 04.doc

Overview

First, I recognize that it is your responsibility to make the decisions in this case. I also know both of you are very busy and this is a new matter for you. However you decide to proceed, I will accept your guidance. In this spirit, for the reasons below, I believe the current draft confirming last Thursday's call should not be sent in its current form.

Until the end of January, I believe we had the initiative in this case. Although we had not received a single e-mail, we were winning the communications battle I believe we were winning the communications battle. Our attached letters of December 23, December 27, January 3, and January 14 had progressively narrowed what FF said was left to produce and scheduled the next dates of production.

This changed in February for two reasons. First, there was direction in early February to trim investigation and accelerate the investigation. I did so, mostly by limiting the scope of e-mails we were seeking from Pequot employees. Per my discussion with Mark last week, that can and will be corrected with a second subpoena.

Second, in an effort to be cordial and reasonable, we have sometimes not spoken as explicitly and consistently with Fried Frank as we need to. This was not the case before February. As a consequence, FF has used those ambiguities or cordiality to their advantage, e.g., the examinations of Pequot employees. I believe the telephone conference on March 10 and the letter we are preparing to send will be taken by FF as further concessions. I address these concerns in the seven points below.

Many of my comments deal with the two classes of e-mails we are seeking. In subsection C.6 we explicitly called for e-mails to or from specified Pequot employees. Although Pequot has agreed to produce those e-mails, it has narrowed the locations where it has agreed to search to avoid producing double deletes. Significantly, we are only seeking 15 percent of the e-mails we were seeking by our November request. I narrowed the scope of these e-mails for the reasons mentioned above. You should also keep in mind that Pequot, not staff, effectively selected the employees for whom it is providing e-mails under subsection C.6. FF told us this list may not be complete. I am sure its not.

I believe our best hope of finding the key e-mails before the scheduled examinations now rests on Pequot's compliance with the provisions of the subpoena calling for "documents," which is explicitly defined to include e-mails and instant messaging. Thus far, Pequot has stubbornly refused to produce those e-mails. It has used a host of devices to do this. For these reasons, I believe we must be explicit. Our last letter on this point was Mark's of 2/18, which Fried Frank claimed was "unclear." For these reasons, I think the language in my proposed draft of March 11 better addresses the issues than the current one. But if you guys disagree with me, I will carry out your instructions with alacrity.

First Point

There is a difference theme in the two letters. Are we confirming an agreement on Thursday (theme of current draft) or are we stating our position what the subpoena calls for (theme of my 3/11 draft)? If we are merely confirming an agreement on the matters discussed on 3/10 we are in trouble. Fried Frank has asserted its interpretation of various terms of the agreement as well as our concessions on those same points. Not only did Fried Frank not change its position on those issues, they were not even discussed. Consequently, through their ears, the discussion on Thursday dealt with the open matters, e.g., when they will deliver the e-mails from the identified Pequot employees and the examination schedule. Our failure to raise those issues on Thursday will be taken as yet another concession.

On the other hand, my proposed draft emphasizes that we were seeking compliance with the plain language of the subpoena except where we explicitly agreed to its modification, as we did on item 23. In that way, we bypass a host of contentions by Fried Frank to the effect that we have narrowed the terms of the subpoena in various meetings or earlier correspondence. This will be put in sharper focus below.

I also wonder whether the reference to Pequot's Fried Frank's commitment "to cooperate fully with our investigation" could be used against us in a subpoena enforcement proceeding. Does it suggest to Fried Frank that we are giving them a pass on their conduct until now and thus encourage more dilatory behavior? It also seems to be a different message than the one Paul was giving them at the beginning of the conversation. Should we be giving Fried Frank conflicting messages?

Second Point

Subpoena provisions relating to e-mails, other than specified employee e-mails

Each of the sections discussed below, except section 19, request "documents," which are defined to include e-mails and instant messaging in backup tapes or wherever located. C.19 calls for "any communication," which would include e-mails and instant messaging. Accordingly, these subsections seek:

1) C.10-C.14: E-mails re all contacts with issuers, road shows, conferences, investment meetings, info relied upon by those who involved in the trading decisions, info communicated to those making

decisions, all relating to trading decisions on 14 issuers during specified periods.

2) C.18-20: E-mails relating to inquiries or investigations compliance with 204A of the Advisor's Act, including any e-mail relating to the receipt of non-public information by any Pequot employees;

Prior Correspondence and Conference Calls

Pried Frank's letter of 2/10

"With respect to items C.10-C.14 of your subpoena, we request your agreement that those items do not extend to e-mails. Of course, we will be producing e-mails for the individuals and time periods specified in Appendix B of your subpoena, some of which may include the type of information described in C.10-C.14. Our interpretation of those items would be consistent with your request in item C.6 for a review of e-mails for the individuals and time periods specified in Appendix B."

2/10 Conference call

Some comments were made during this conference call which suggested we would not require PCM to review all file folders to locate e-mails responsive to our subpoena, provided that they would do a key word searches.

My letter of 2/11: Confirming conference on 2/10

Yes, these e-mails are called for by the subpoena and should therefore be produced. It will not be necessary to individually review the documents in every e-mail box. We understand from out IT staff that your client may conduct a key word search to locate these emails. We will provide you with the appropriate key words on Monday afternoon. You have indicated that you wish to discuss this matter with your client's IT staff or vendor. Please do so and advise us of your client's position by noon on Monday, February 14. We must also note your question comes eleven weeks after you were served with our November 24, 2004, letter, which raised the identical issue.

Pried Frank's letter of 2/14

"Based on our February 10 call, it is our understanding that we do not have to review e-mail files in order to satisfy our obligations under items C.10-C.14 of your subpoena. During the call, Mr. Aguirre asked us to find our whether we could perform electronic word searches across an entire exchange server that has been restored. If so, Mr. Aguirre said that he would provide us with a list of search terms. The vendor our firm has retained to assist in the restoration of e-mail backup tapes has advised us it is unaware of a way to search e-mails in individual e-mail boxes that have not been restored."

Mark's letter of 2/18

"We also discussed Pequot's compliance with subpoena Items C.10 - 14 on Tuesday, in particular, which folders Pequot should search for responsive e-mails. On reflection, it might make sense to consider use

of a key-word search through all backup tapes and servers where e-mails are stored, details to be agreed in the prompt conference we propose and confirmed by correspondence with your firm and an independent vendor hired by Pequot to retrieve and produce responsive e-mails."

Pried Frank's letter of 2/22

The statement below is the last explicit comment by Pried Frank on the subject of these e-mails. Referring to Mark's letter of 2/18, Pried Frank's letter reads: "The statement in your letter that 'it might make sense to consider use of a keyword search through all backup tapes and servers where e-mails are stored' is unclear. As explained in my February 14 letter to you and after consultation with On-Site, we are not aware of a method to perform electronic word searches through restored exchange servers. Our understanding is that such searches can only be performed across individual e-mail boxes (not just Exchange Servers) that have been restored." What he does not say is that you can do the search of restored e-mail mailboxes.

Mark's letter of 2/22

This letter does not address Pried Frank's point above. Also, this was our last response to FF's strawman argument that you cannot search for e-mails on an exchange server.

March 1 phone conference

On questioning from David, On-Site representatives agreed that they routinely do keyword searches of restored backup tapes containing e-mails.

March 11 phone conference

There no discussion of e-mails called for by these subsections during the 3/11 conference. FF will assume or pretend that this call only dealt with e-mails from specific employees.

My comments

Fried Frank has steadfastly claimed these subsections of our subpoena do not call for e-mails, despite the clear language of the subpoena and the fact that we have repeatedly told them it does. Pried Frank's letter described Mark's e-mail on this issue "unclear." The bottom line is this: it is not enough to tell them that we will accept a substitute for what the subpoena calls for. I think our statement must be unequivocal and explicit. I believe the language proposed in my 3/11 draft meets this criteria. It reads:

"Regarding subsections C.10 through C.14, C.18, C.20, C.21, and C.22, we are willing to accept key word searches through all mail box folders, whether stored on servers or backup tapes, for the specified time periods as an alternative to a review of each file in each folder. If you choose this alternative, we must promptly agree on the search terms. In any case, PCM must produce all unprivileged e-mails and instant messages called for by the above provisions of the subpoena by April 10, 2005."

One final point. Fried Frank has not mentioned the e-mails requested by items C.18 through C.22, which also contain the term "document," or C.19, which calls for all communications. I only noticed they had ignored C.19 (calling for "all communications") over the weekend. Hence, we should also include C.19 in our letter.

Third Point

In preparing my 3/11 draft, I overlooked "double-deleted e-mails." As we discussed, these are the emails that are deleted from their original folder and then deleted from the delete folder. We set up the telephone conference on March 1 to get clarification of this issue, but I have not gotten any feedback from IT whether they bought into Pequot's explanation why it did not capture "double-deletes." I will e-mail Scott and David on Monday to get their input on this point. Again, as discussed with Fried Frank previously, this can be done by keyword searches, assuming all e-mail boxes were restored. If they decide not to do keyword searches, then this item can be included in the review of folders to find other e-mails as suggested on the prior point.

Fourth Point

Subpoena Provisions: C.1, C.2, C.3, C. 5, C.15, C.16, C.17, and C.21.

Current draft

"Our February 7 Subpoena: You agreed that all documents required to be produced by our February 7 subpoena (including e-mails and instant messages) will be produced to us no later than April 10, 2005. The production will include but not be limited to items C.1 through C.3, C.5, C.15 through C.17, and C.21."

My 3/11 Draft

Again, I think we should be specific. The language proposed in my 3/11 draft is quoted below.

Subsections C.1 through C.3, C.5, C.15 through C.17 and C.21

You indicate that comments by Staff have led you to believe that PCM's productions pursuant to our November 24, 2005, have been accepted as full compliance with the provisions of our subpoena specified above. No comment by Staff was intended to narrow the scope of the documents called for by the above terms of the subpoena

Pequot's position

In Pequot's letter of February 28, 2005, it grossly distorted my letters of February 11 and 22. Fried Frank's letter reads: "In your February 11 and 22 letters, you stated your belief that our prior productions should have satisfied the Subpoena except for e-mails and your request for a spreadsheet including time of order entry information. Therefore, we believe the documents described above satisfy Items C.1-C.3, C.5, C.15-17 and C.21 of the Subpoena. If our understanding is incorrect, please advise us."

My Comments

This is an excellent example how Fried Frank misstates and distorts our communications. Let me be clear on this point. Fried Frank is saying that my letters of 2/11 and 2/22 told them we believed they had satisfied these terms of the subpoena.

On this issue, my 2/11 letter reads: "We would expect that all these documents were previously delivered in response to our earlier requests. To the extent they have not, they should be delivered to the staff in accordance with the date specified in the subpoena, February 17, 2005." Similarly, my 2/22 letter to Audrey Strauss said this: "As a practical matter, assuming PCM has complied with our earlier requests for documents, it would have few new documents to produce, other than the e-mails now under discussion (italics in original)."

Given this history, I think we need to be more explicit than the current draft.

The more interesting issue is why they are saying staff agreed, which we did not, instead of saying they provided the documents. They're hiding something and I think the lack of clarity in the above language could help them. That's why my language specifically deals with their contention.

Fifth Point

Current draft

Initial Investigative testimony: At your request, we agreed to delay the initial round of investigative testimony focused on Pequot employees pursuant to subpoenas served February 7 and 14 requiring appearance for testimony on dates from March 14 through April 4, and further agree to your proposed schedule pursuant to which testimony days will begin on April 15 through June 3. The order of testimony, however, will be that set out in the Commission subpoenas. All documents responsive to our document requests and subpoenas which contain the name of or relate to a witness will be produced to us at least two weeks prior to that witness's scheduled testimony.

My Comments

This above language creates an ambiguity. Are we telling them to stick with the exact dates or just reschedule within the range? If the exact dates, I can slot other exams during that period, which I need to do now. Also, we have control if they want to change dates. If we have given them the time range, I cannot schedule other dates until they have finished their scheduling. We've been in this situation since we told them to submit a schedule.

Sixth Point

Current draft

To further facilitate timely compliance, we agreed to withdraw item C.23 and, at least for purposes of the April 10 production, to narrow

item C.22 to the period January 1, 2002 through December 31, 2004 inclusive.

My Comments

This language is a little off. In late January, when they asked about C.22, I informed told KH that he would not have to comply with C.22 if PCM provided C.23. Both C.22 and C.23 sought the same info, though in different ways, because they had fought us so hard on this. He agreed but then backed off on C.23. The italicized language from my draft cryptically tells FF why we now want C.22 and that we are serious. It reads: "In view of the discussion yesterday, we are withdrawing subsection C.23 of our subpoena and narrowing the scope of subsection C.22 to the period from January 1, 2002, through December 31, 2004. As narrowed, we expect full compliance with its terms."

Seventh Point

I would like to discuss further with Paul the issue whether we are entitled to require Pequot to provide a privileged log. My preliminary research discussed below suggests we are on solid footing. Further, none of the parties to this investigation, including Pequot and its counsel, have contended we are not entitled to a privileged log. In fact, KH's only excuse for not providing the log was that he was too busy.

I think the analysis that we are requesting them to prepare something begins at a faulty point. Instead, as I read the cases, we are requesting Pequot to produce all relevant documents. In response, Pequot must object to producing privileged documents or waive that privilege.

Since 1991, Rule 45(d)(2) has provided:

"When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."

As I read the cases, the 1991 amendment merely conformed Rule 45 to the existing practice. In order to assert an objection on the basis of privilege to producing documents in response to a subpoena, the courts required that the objection be stated with specificity, identifying the documents. See United States v. Exxon Corp., 87 F.R.D. 624 (1980) ("The index must identify each privilege claimed; if the agency asserts more than one privilege for a particular document, it must identify which privilege attaches to each segment. Finally, the index must contain a rudimentary description of each document."). See also FTC v. Glaxosmithine, 202 FRD 8 (2001) (Dealing with an administrative subpoena, the court noted: "The respondent is correct in asserting that the subpoena provides for the withholding of privileged material and the submitting of a privilege log as an alternative to disclosure.")

In sum, I would contend that in asserting an objection, Pequot must identify the documents and provide sufficient information to determine whether in fact the document appears to be privileged. This simply the way privileges are generally asserted. Additionally, the language I included in the subpoena was taken from another subpoena, possibly from the one that Bob provided. OCIE also told me that routinely request and obtain these logs. Finally, if we do not press on the privilege issue, given Fried Frank's practices to date, I can only imagine how far Fried Frank will extend the perimeter of the privilege.

SUBPOENA ATTACHMENT (edited)

A. DEFINITIONS

1. The term "document" means all records and other tangible forms of expression in your possession, custody or control, including electronic mail..

2. The term "electronic mail" and "e-mail" and include all electronic mail messages, instant messaging and all attachments thereto regardless of where they reside, including but not limited to: "in box" folders, "sent" folders, archived folders, bulletin boards; Blackberry or other remote systems, hard drives, e-mail servers, file servers, back-up tapes, disks, platters, or other electronic media, and printed copies of electronic mail messages.

C. Production

Produce all documents in your possession, custody or control described below:

1. A complete list of all Pequot employees for the calendar years ending December 31, 2001, December 31, 2002, December 31, 2003, and December 31, 2004;

2. A complete list of all telephone numbers from January 1, 2001, to the present of each Pequot employee;

3. All records of all incoming and outgoing telephone calls for each person identified in Appendix B for the period specified for each such person in Exhibit B;

4. Records of the PCM employee who recommended each trade of the securities of any issuer identified on Appendix C during the specified trading period for each such issuer on Appendix C, as PCM is obligated to maintain pursuant to Rule 204-2(a)(3);

5. A complete list of the names of the investors in each investment vehicle managed by Pequot, including each investment vehicle identified in Instruction 1, for the calendar years ending December 31, 2001, December 31, 2002, December 31, 2003, and December 31, 2004;

6. All emails to or from each person identified on Appendix B for the period specified for each such person in Exhibit B;

7. All instant messaging to or from each person identified on Appendix B for the period specified for each such person in Exhibit B;

8. All research materials relating to the fourteen issuers identified in Appendix C prepared, generated or circulated by Pequot during the specified trading period for each such issuer on Appendix C;

9. All risk management material relating to the fourteen issuers identified in Appendix C prepared, generated or circulated by Pequot during specified trading period for each such issuer on Appendix C;

10. All policies and procedures relating to Section 204A of the Investment Advisers Act of 1940 ("Advisers Act") that were maintained by Pequot at any time during the period January 1, 2001 to the present;

11. All Codes of Ethics that were in force for any period of time from January 1, 2001 to the present;

12. All Compliance Manuals that were in force for any period of time from January 1, 2001 to the present;

13. Any document relating to any inquiry or investigation, whether internal or external, concerning conduct covered by the above referenced Compliance Manuals, Codes of Ethics or any policy and procedure adopted pursuant to Section 204A of the Advisers Act, including any internal investigation relation to the receipt of any Pequot employee of non-public information regarding any issuer of publicly traded securities;

14. Any communication or any record of any communication from any Pequot employee to any Pequot compliance officer that said any employee received, possibly received, or may have received non-public information regarding any issuer of publicly traded securities;

15. Any documents prepared from January 1, 2001, to the present, in connection with any inquiry or investigation by the NYSE, AMEX, NASD, CBOE, PHLX, ISE or other self-regulatory organization, concerning the purchase or sale of any security prior to a public announcement of a significant event affecting the price of any such security;

16. Manuals and other documents which identify and describe in detail the design and usage of securities order tracking systems used by Pequot including, for each system, a description of the database files used for recording and/or tracking of securities trades made by or on behalf of PCM or its affiliated funds or accounts, including record layout descriptions for each file describing content, data type and length of each field in the file[s], relationships between the file[s] and relationship between systems;

17. Any and all documents maintained by or on behalf of Pequot which reflect order entry times and all other specifics of orders placed (e.g., size, time, trader, accumulated position) and executed

for the purchase and/or sale of securities by or on behalf of Pequot or its affiliated funds or accounts;

18. All electronic data maintained by Pequot on its EZE Caste or Hedgeware software systems from January 1, 2002, through December 31, 2004, or in the alternative, an Excel spreadsheet containing the fields of information described in Appendix D for all publicly traded securities from January 1, 2002, through December 31, 2004;

Appendix B

Name	Period specified for this Subpoena
Navroze Alphonse	11/1/02 through 10/31/03
Joe Batcha	7/1/03 through 6/30/04
Mark Broach	1/1/2001 through 12/31/2003
Jeremy Chase	2/1/03 through 1/31/04
Paul Farrell	5/1/03 through 4/30/03
Josh Fisher	1/1/02 through 10/31/02
Faraz Naqvi	2/1/2002 through 1/31/03
Steve Orlov	9/1/03 through 5/30/04
James Patricelli	2/1/02 through 1/31/03
Arthur Samberg	1/1/01 through 12/31/03 Gregory Rossman 9/1/02 through 5/30/03

Appendix C

Issuer	Specified Trading Period
Boston Scientific Corp.	8/1/03 through 7/31/04
Blue Coat Systems, Inc.	7/1/03 through 6/30/04
DJ Orthopedics, Inc.	2/1/02 through 1/31/04
Encor Group Corp.	11/1/02 through 10/30/03
Cigna Corp.	8/1/02 through 7/31/03
Coinstar, Inc.	8/1/02 through 7/31/03
Elite Information Group	5/1/02 through 4/30/03
Airborne, Inc.	5/1/02 through 4/30/03
Rambus, Inc.	3/01/02 through 2/28/03
Household Intl. Inc.	12/1/01 through 11/30/02
AstraZenaca PLC	11/1/01 through 10/31/02
Pharmaceutical Resources	11/1/01 through 10/31/02
Pharmaceutical Resources	10/1/01 through 9/30/02
Kroger Co.	1/1/00 through 12/31/01
Heller Financial	9/1/00 through 8/31/01

From: Aguirre, Gary J.
Sent: Wednesday, December 29, 2004 11:42 AM
To: Plimpton, Scott
Subject: RE: Phone Records

You're a hero.

From: Plimpton, Scott
Sent: Wednesday, December 29, 2004 10:56 AM
To: Aguirre, Gary J.
Subject: RE: Phone Records

Gary,

I finished loading the records into Access. There are too many for an Excel spreadsheet. I put the database in [redacted] There are two tables. One contains the calls to the 800 number and the other contains the other calls. I searched the "Not 800 Numbers" table and extracted the calls on 12/22/2003. These do fit in a spreadsheet so I've attached it. I also created several queries sorting the data as we've talked about. If you need help with Access, I can either come to your office or you can stop in mine and I'll show you what I've come up with and we can set up some additional queries.

The data in Column I (Dialed_Num) is the same as Column AB (Term_Num) except for international calls.

Thanks,

Scott

<< File [redacted] >>

From: Aguirre, Gary J.
Sent: Tuesday, December 28, 2004 3:54 PM
To: Plimpton, Scott
Subject: RE: Phone Records

Scott:

There are three fields that would be useful to sort.

The most important is Column I or AB, which have the same information.

The second would be C, which I suspect related in some way to Francois.

The third is the time (H) for the day of 12/22/03.

But, I'll happily take what ever you can come up with.

Thanks,

Gary

From: Plimpton, Scott
Sent: Tuesday, December 28, 2004 3:46 PM
To: Aguirre, Gary J.
Subject: Phone Records

Gary,

I'm finally getting the phone records into a format where I can sort them and do the reporting we talked about. It turned out to be more challenging than I initially thought it would be. They merged several different data sets together so the fields are not the same throughout the data. For example, the first set is the (800) calls. Then there appear to be the outgoing calls. There's a set at the end that I'm not sure what it is. I need to run through the source file again to see if I can break it apart at each different kind of call data.

Which field(s) were we looking at reporting on? It appears that the fields vary between sets of data so we might need to look at a different field in each one. I'll let you know what we end up with.

Thanks,

Scott

From: Kreitman, Mark J.
Sent: Thursday, June 30, 2005 2:59 PM
T : Hanson, Robert; Aguirre, Gary J.; Eichner, Jim; Jama, Liban A.
Subject: Pequot

Bob, Gary, Jim, Leban –

Can we plan on meeting Tuesday at 11 to talk over where we are and need to go on this case?

Thanks. Mark

From: Aguirre, Gary J.
Sent: Tuesday, July 12, 2005 11:30 AM
To: Kreitman, Mark J.; Hanson, Robert
Subject: FW: Letter to G. Aguirre of 7-11-05 w/enclosures

Storch's follow up from yesterday.

From: Storch, Laurence [mailto[redacted]]
Sent: Monday, July 11, 2005 6:01 PM
To: Aguirre, Gary J.
Subject: FW: Letter to G. Aguirre of 7-11-05 w/enclosures

<<[redacted]

www.DilworthLaw.com

This E-Mail is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege. If you have received this communication in error, please do not distribute it and notify us immediately by email postmaster@dilworthlaw.com or via telephon[redacted]nd delete the original message. Unless expressly stated in this e-mail, nothing in this message or any attachment should be construed as a digital or electronic signature or as a legal opinion.

DILWORTH PAXSON LLP

LAW OFFICES

DIRECT DIAL NUMBER: [redacted]

Laurence Stotch [redacted]

July 11, 2005

Gary J. Aguirre, Esq.
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-4010

RE: HO-9818

Dear Mr. Aguirre:

I am writing in response to the Staff's request made during our telephone call today for additional information about the role Irv Pollack and I have undertaken in the above referenced matter. In response to your request for our retainer letters, I have enclosed our letter of May 9, 2005 to Audrey Strauss, Esq., of Fried, Frank, Harris, Shriver & Jacobson, LLP and her letter to us of May 24, 2005. As I have previously advised you, we have been asked by Pequot Capital Management, Inc. to assist Fried Frank in its representation by independently overseeing, reviewing and advising with respect to document production.

When we spoke today, I was asked whether Mr. Pollack and I felt we were in a position to "bind" Pequot, as a client. The answer is, yes. If Pequot instructed us to do so, we could. As a practical matter, I would expect that Fried Frank would continue to be the best point of contact for securing Pequot commitments. We do not expect that situations will arise where we would be called upon to articulate such commitments, certainly not without consultation with Fried Frank. However, were we to be asked by Pequot do so, we believe we could.

Lawyers have served in independent roles on many matters, including matters where interaction with agency staff has been routine. It is Irv's and my hope that we can work to promote full, efficient and prompt resolution of any issues in this matter and we look forward to meeting with you at your earliest convenience to make sure that we fully understand all of the issues involved

Sincerely,

Laurence Storch

Enclosures

cc: Mark J. Kreitman, Esq. w/out enclosures
Robert B. Hanson, Esq. w/out enclosures

Arych Davis, Esq. w/out enclosures
Audrey Strauss, Esq. w/out enclosures

DILWORTH PAXSON LLP

LAW OFFICES

[redacted] [redacted]

May 9, 2005

Andrew Strauss, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York, NY 10004

RE: Representation Agreement

Dear Ms. Strauss:

I am writing to confirm that you have retained our firm to consult with you in connection with responses to SEC requests for production of records from Pequot Capital Management and/or related entities.

Irv Pollack's rate for this work is $550.00 per hour, my rate is $500.00 per hour. Disbursements will also be billed.

We look forward to working with you and thank you once again for the opportunity to assist you.

Sincerely,

Laurence Storch

Attachment: Firm Policies

Acknowledged & Agreed

Andrew Davis

DEBEVOISE & PLIMPTON LLP
To: Ms. Audrey Strauss, Esq.

Communications.

The firm regularly communicates with its clients and with third parties, on behalf of its clients, through the use of landline, digital and cellular telephones, unencrypted e-mail and telecopier machines. We also reserve the right to use portable (wireless) telephone instruments. Each of these means of communication is practically and technologically susceptible to varying risks of interception by (or misdelivery to) unintended recipients. By retaining our firm, you consent to the firm's utilization of the above-referenced means of communication. If you would prefer that the firm refrain from using one or more of the above-referenced means of communication please communicate that preference to us in writing, and we will revise this agreement accordingly.

Privacy Policy Notice.

Information that we receive from you will be held in confidence, and will not be released to people outside the firm, except as agreed to by you, or as required under an applicable law.

Withdrawal from Representation and Future Services.

This agreement is subject to termination by either party upon reasonable notice for any reason. Upon such termination, however, you will remain liable for any unpaid fees and costs. This agreement will also apply to services rendered for such future matters that we mutually agree will be handled by the firm. If, however, such services are substantially different from those to which this agreement applies, either party may request that a new agreement be executed, or that this agreement be re-acknowledged.

Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York, NY 10004-1980
Tel: [redacted]
Fax: [redacted]
www.friedfrank.com

Direct Line: [redacted]
Fax: [redacted]

May 24, 2005

[redacted]

Irv Pollack, Esq.
Dilworth Paxson LLP
1618 N Street, NW
Suite 400
Washington, DC 20056

Re: Pequot Capital Management, Inc

Dear Mr. Pollack

This letter confirms our engagement of you and your firm, Dilworth Paxson LLP, to assist Fried Frank Harris Shriver & Jacobson (FFHSJ) in its representation of Pequot Capital Management, Inc. ("Pequot") (the Client). Pequot has retained your firm in connection with an SEC investigation, HO-9818. This agreement is effective as of the date your services were first requested in this matter.

The scope of your firm's representation is to act as counsel in this matter to provide advice and oversight with respect to the document production made on behalf of Pequot in the above-mentioned SEC investigation.

In the course of your work, it is expected that your firm will gain access to privileged attorney-client communications and to attorney work product. By this agreement you acknowledge and agree that it is imperative that work product and privileged materials remain confidential. Therefore, you agree to keep confidential all work product and privileged materials. You will maintain all work product and confidential material and other documents, information, and the like acquired or prepared in this engagement in a secure place. This binder to protect privileged materials and work product extends to and includes each and all of your partners and employees as if each were a party hereto. You agree to reveal information to these persons to the extent necessary for them to assist you.

You agree to return to FFHSJ at the earlier of the ultimate conclusion of this matter or upon FFHSJ's request all materials related to this matter, including but not limited to work product and privileged materials, including any copies, notes summaries, indices, or extracts thereof, however, compiled or recorded. You and your partners or employees will not retain any of the above in your or their files or in your or their possession or control. Your obligation to maintain strict confidentiality will survive termination of the engagement to assist FFHSJ. You will notify FFHSJ of any request or effort by any third party to obtain voluntary or involuntary disclosure from you of any work product, privileged materials or other writings, information, or knowledge relating thereto.

Charges for your services will be billed at rates agreed between Pequot and Dilworth Paxson. Bills will be sent to Pequot for payment. You agree that the obligation for payment of your fees and expenses is ultimately and solely the responsibility of Pequot. You further agree that Fried, Frank, Harris, Shriver & Jacobson LLP is not liable for your fees and expenses on this engagement. You will keep us advised during the course of your work on any unusual circumstances that will affect your total fee.

If any portion of this Agreement is held to be void, invalid or otherwise unenforceable, in whole or in part, the remaining portions of this Agreement shall remain in effect. This Agreement reflects prior oral understandings between us relating to these matters.

If the foregoing terms are acceptable, please sign below and return one copy to us. We look forward to working with you.

Very truly yours,

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

By _____
Audrey Strauss

ACCEPTED AND AGREED:

By: _____
Irv Pollack, Esq.

Date: 6/9/05

AS:mf

NY02:469381v2

From: Kreitman, Mark J.
Sent: Thursday, July 07, 2005 4:12 PM
To: Kreitman, Mark J.; Aguirre, Gary J.; Davis, Charles; Eggert, Jacqueline D.; Eichner, Jim; Fielder, Dave; Hanson, Robert; Jama, Liban A.; Martin, Herbert; Miller, Amy; Smith, Janene M.; Swanson, Robert T.; Tankel, Jason; Van Meter, Stephen; Williams, Constance; Witherspoon, David
Cc: Berger, Paul; Miller, Nancy B.; Lo, Jessica K.
Subject: RE: Saturday Bash

Phone: [redacted]
Cell: [redacted]

From: Kreitman, Mark J.
Sent: Thursday, July 07, 2005 4:10 PM
To: Aguirre, Gary J.; Davis, Charles; Eggert, Jacqueline D.; Eichner, Jim; Fielder, Dave; Hanson, Robert; Jama, Liban A.; Martin, Herbert; Miller, Amy; Smith, Janene M.; Swanson, Robert T.; Tankel, Jason; Van Meter, Stephen; Williams, Constance; Witherspoon, David
Cc: Berger, Paul; Miller, Nancy B.; Lo, Jessica K.
Subject: Saturday Bash

Colleagues and Friends,

Our Second Annual Beer and Brat Pool Bash is Sunday July 17 from 1 p.m. til whenever.
I'll bring the aforementioned, other delicacies as well as kids, spouses, friends, significant others, insignificant others, and feline-friendly pets (no dogs please) welcome.

REDACTED

REDACTED

Pool is warm and sunny, chaises are in the shade.
Look forward to seeing you all.

Best, Mark

From: Aguirre, Gary J.
Sent: Tuesday, July 05, 2005 3:26 PM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Eichner, Jim; Jama, Liban A.
Subject: Audrey phone call

Now down to 58,000 from 200,000 withheld e-mails for 3/22 subpoena. Looks like 2 months to complete production. Will set date for 4/15 subpoena next week. Worked out IT access issues. All e-mails going on On Site so can be searched without using 2 databases. When production complete, we will move CDs from On Site to our database using a harddrive, which should make IT happy.

From: Aguirre, Gary J.
Sent: Thursday, July 07, 2005 12:29 PM
To: Kreitman, Mark J.; Hanson, Robert
Subject: RE: PCM trading in GE and HF

I understand that Nancy's chart summarizes the volume and prices in the traditional way staff looks at an insider trading case. It shows what Pequot did in relation to the market. But that leaves out two dimensions: what did Samberg want to do? What did Dartley (trader) try do? For example, Nancy's chart shows this activity for the last week:

Date	Pequot volume	Total HF Volume
7/23/2001	60,400	394,800
7/24/2001	38,500	227,200
7/25/2001	73,000	477,600
7/26/2001	50,000	451,700
7/27/2001	10,000	101,000

But here's how it looks when you throw in what Samberg wanted to do:

Date	Pequot volume	Total HF Volume	Samberg's order to Dartley
7/23/2001	60,400	394,800	480,400
7/24/2001	38,500	227,200	418,500
7/25/2001	73,000	477,600	373,000
7/26/2001	50,000	451,700	302,900
7/27/2001	10,000	101,000	243,900

So, what was the basis for Samberg's conviction to buy at this level? Must have been pretty convincing, right? I summarized that evidence in earlier memos.

What Samberg wanted to do was the emphasis to the SDNY on June 15.

From: Kreitman, Mark J.
Sent: Wednesday, July 06, 2005 6:06 PM
To: Miller, Nancy B.
Cc: Hanson, Robert; Aguirre, Gary J.; Aguirre, Gary J.; Aguirre, Gary J.
Subject: RE: PCM trading in GE and HF

My sentiments exactly.
As I told Nancy, I was in the process of doing just such a rough calc when she arrived with the goods.
Many thanks.

From: Hanson, Robert
Sent: Wednesday, July 06, 2005 5:38 PM
To: Miller, Nancy B.; Kreitman, Mark J.; Aguirre, Gary J.; Eichner, Jim; Jama, Liban A.
Subject: RE: PCM trading in GE and HF

Thanks Nancy. Excellent work.

From: Miller, Nancy B.
Sent: Wednesday, July 06, 2005 5:33 PM
To: Kreitman, Mark J.; Hanson, Robert; Aguirre, Gary J.; Eichner, Jim; Jama, Liban A.
Subject: PCM trading in GE and HF

Hi,

Attached is a table showing PCM's trading in HF and GE as a percentage of volume around the time of the merger. The acquisition was announced on July 30, 2001. (I'm assuming that when a company is shorted that this activity is included in the volume calculation for that day. Let me know if this is incorrect.)

Thanks,
Nancy

From: Kreitman, Mark J.
Sent: Thursday, July 14, 2005 3:30 PM
To: Aguirre, Gary J.; Hanson, Robert
Cc: Eichner, Jim; ORourke, Kevin; Ribelin, Eric; Jama, Liban A.
Subject: RE: Pequot Obstruction and Fried Fank coverup?

Sounds like some questions for Irv and Larry, at this point.

From: Aguirre, Gary J.
Sent: Thursday, July 14, 2005 6:59 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Eichner, Jim; ORourke, Kevin; Ribelin, Eric; Jama, Liban A.
Subject: Pequot Obstruction and Fried Fank coverup?

The privilege logs that Fried Frank has recently provided, the ones I showed Bob, show that e-mails are being withheld from production that are not likely privileged and that appear to relate to the lost or damaged backup tapes. No attorney sent or received these e-mails. Only the vaguest description of content is provided, much vaguer than usual. Many involve Ganti, who generated a very suspicious e-mail about one of the "damaged" backup tapes. Audrey was extremely evasive when I questioned her about how these documents could be privileged and suggested some very broad scope under *Upjohn*. Eric and Liban were also present.

Incidentally, according CATS, there have been six subpoena enforcement proceedings since December 2004: D-02573-C, D-02654-B, FW- 02854-B, HO-10117-B, NY-06749-G, SF-02682-C.

Paul R. Berger
555 13th Street, N.W.
Washington, DC 20004

January 11, 2007

Barr P. Huefner
United States Senate
Committee On The Judiciary
Room 224
Senate Dirksen Office Building
Washington, DC 20510

Dear Mr. Huefner:

Enclosed are my answers to questions submitted by Senators Specter and Grassley on December 13, 2006.

Thank you very much for your attention.

Sincerely,

Paul R. Berger

ANSWERS TO SENATOR SPECTER'S QUESTIONS

Thank you Chairman Specter for the opportunity to respond to your questions concerning the United States Securities and Exchange Commission's investigation of Pequot Capital.

1. Were you a member of the SEC Compensation Committee in 2005?

Answer

I was a member of the Compensation Committee of the Division of Enforcement in 2005.

a. Did you concur in the recommendation by Messrs. Hanson and Kreitman that Gary Aguirre receive a two-step merit increase in his salary?

Answer

Yes. This was the most common increase given to Division of Enforcement employees at that time.

b. As a member of the Compensation Committee, did you review Mr. Aguirre's performance evaluations?

Answer

Yes.

2. Did you encourage Bob Hanson to generate a supplemental evaluation of Mr. Aguirre's performance on or around August 1, 2005? Why?

Answer

I asked Mr. Hanson, along with Mr. Kreitman, to consider whether they should include in their evaluation of Mr. Aguirre language reflecting their repeated criticisms of his performance. I left the decision to them, since they were closer to his work.

3. In your written statement at page 15, you note that "during the summer of 2005, Mr. Aguirre's supervisors showed me a draft work evaluation for the period running through the end of April 2005 . . . . I had no problem with the evaluation . . . . I noted, though, that the draft evaluation did not contain any constructive criticism . . . . They decided that, to be fair to Mr. Aguirre, they should include some constructive criticism." Isn't it true that on August 1, 2005, you ordered Mr. Hanson to generate a supplemental evaluation of Mr.

Aguirre's work well after the time when you first saw the "work evaluation" as part of your responsibilities on the Compensation Committee?

Answer

I don't recall when I first saw a draft evaluation for Mr. Aguirre, other than it was in the summer of 2005. I am quite confident that, as noted above, I suggested to Mr. Hanson and Mr. Kreitman that they consider whether to include language reflecting their repeated criticisms of Mr. Aguirre's performance. My purpose in making this suggestion was simply to be candid with Mr. Aguirre about his shortcomings. I made the identical suggestion at the same time concerning another lawyer supervised by Mr. Hanson and Mr. Kreitman. That lawyer had no involvement in the Pequot investigation and has not been the subject of any adverse personnel action.

4. Did you suggest that Linda Thomsen terminate Mr. Aguirre? Why?

Answer

I believe I first considered whether to extend Mr. Aguirre's employment in mid to late August 2005. At that time the Division of Enforcement's Administrative Officer notified me that Mr. Aguirre's one-year probationary period was about to end. That left us with what was a business decision either to end Mr. Aguirre's employment or grant him, in essence, permanent tenure in the absence of serious misconduct.

I asked Mr. Kreitman and Mr. Hanson for their recommendation. They noted that, despite Mr. Aguirre's talents and hard work, because of his resistance to supervision, refusal to work with his colleagues, unreliability, and volatile temper, it was unlikely that he could become a successful contributor to the work of the Division of Enforcement. After further discussion, I concurred with this recommendation, and Mr. Kreitman, Mr. Hanson, and I met with Ms. Thomsen and discussed it fully.

In reaching our conclusion we considered the totality of Mr. Aguirre's performance, both those aspects reflected in the recommendation of his supervisors to the Compensation Committee and the opinion of those same persons reflected in the supplemental evaluation.

5. Was there anything untoward, unethical or illegal in your conduct with respect to the Pequot investigation?

Answer

No. All actions that I took, or declined to take, were lawful and motivated solely by the interests of the investing public. We investigated where the facts and law took us.

ANSWERS TO SENATOR GRASSLEY'S QUESTIONS

Questions

Introductory Statement

Firing someone just after giving him a pay raise is pretty unusual. If the reasons that Gary Aguirre's supervisors have given for terminating him are the true reasons, then it is hard to understand why he would have gotten a positive evaluation and a pay raise. Further, the lack of corroborating contemporaneous documentation is another questionable area. If Mr. Aguirre was an employee with a troubled history at the SEC it is difficult to understand why there is so little documentation of communications between his supervisors to show it.

Answers

Introductory Statement

Awarding Mr. Aguirre a two-step increase at the end of July 2005 does not demonstrate that the reasons given for not extending Mr. Aguirre's appointment a month later were not "the true reasons." Notwithstanding Mr. Aguirre's difficulties with supervision and shortcomings as a colleague, he was awarded a two-step merit increase to reward his hard work during the period under evaluation.

I did not consider whether Mr. Aguirre's employment should be terminated in connection with the deliberations of the Compensation Committee nor in connection with the virtually contemporaneous supplemental evaluation prepared by Mr. Aguirre's supervisors. I believe I first considered whether to extend Mr. Aguirre's employment in mid to late August 2005. At that time the Division of Enforcement's Administrative Officer notified me that Mr. Aguirre's one-year probationary period was about to end. That left us with what was a business decision either to end Mr. Aguirre's employment or grant him, in essence, permanent tenure in the absence of serious misconduct.

I asked Mr. Kreitman and Mr. Hanson for their recommendation. They noted that, despite Mr. Aguirre's talents and hard work, because of his resistance to supervision, refusal to work with his colleagues, unreliability, and volatile temper, it was unlikely that he could become a successful contributor to the work of the Division of Enforcement. After further discussion, I concurred with this recommendation, and Mr. Kreitman, Mr. Hanson, and I met with Ms. Thomsen and discussed it fully.

In reaching our conclusion we considered the totality of Mr. Aguirre's performance, both those aspects reflected in the recommendation of his supervisors

to the Compensation Committee and the opinion of those same persons reflected in the supplemental evaluation.

As to corroborating contemporaneous documentation about Mr. Aguirre's workplace issues, as early as December 2004 I raised with Mr. Aguirre my concerns about his ability to respond to supervision. Mr. Aguirre acknowledged in writing that I had raised such a question. I responded to Mr. Aguirre and noted that he mis-characterized my concern as questions about his "ability to take instructions from a younger supervisor." In fact, as the evidence shows, I corrected him that my concerns had to do with his "comfort in reporting to someone less experienced . . . ."

Second, the supplemental evaluation itself provides documentation for the concerns of Mr. Aguirre's supervisors about his willingness to take supervision. Mr. Aguirre dismisses the evaluation as an attempt to paper the record to support his termination, but as all involved have testified, it was prepared precisely so the documentary record would be consistent with the verbal complaints, and it was prepared a month before Mr. Aguirre's termination.

Third, while not contemporaneous or in writing, the sworn testimony of *all* of Mr. Aguirre's supervisors about their experiences with Mr. Aguirre provides compelling substantiation for the decision not to extend his employment.

In retrospect, perhaps Mr. Aguirre's supervisors would have been in a better position to rebut Mr. Aguirre's allegation had they immediately documented each of Mr. Aguirre's temper tantrums; each time Mr. Aguirre left the SEC building because he had become upset with his supervisors; each time Mr. Aguirre resigned; each time Mr. Aguirre behaved in such a hostile and abusive manner as to cause counsel to complain about him; each time he behaved in an inappropriate manner in testimony; each time he sent out subpoenas in violation of the Right to Financial Privacy statute; each time he demanded of counsel things that were clearly inconsistent with SEC policy; and each time he stopped talking to his Assistant Director, and documented these events. In his testimony, Mr. Aguirre never denied that each of these instances occurred.

Our failure to be more critical sooner and in writing hardly establishes that the grounds for terminating Mr. Aguirre were any different than what was stated at the time and under oath to the Committee. It should be clear to all concerned that there is no evidence – direct or circumstantial – that supports Mr. Aguirre's allegation that he was terminated because he sought the deposition of Mr. Mack. That allegation rests not on evidence but only on Mr. Aguirre's surmise.

Question 1

(1) According to documents provided by the SEC, on August 1, 2005, the Division of Enforcement was to transmit the final results of the merit pay recommendations to the

Office of Human Resources. Emails produced by the SEC for August 1, note two separate conversations, one between you and Lawrence West7 and another between you and Susan Markel8.

(a) The email between you and Ms. Markel starts with you stating:

"Susan, I need to make another change to the merit pay schedule." Markel responded:

"I am on a conference call, but unless it is a typo, you may want to circulate it to all of the Comp Committee and Linda and see if anyone has a problem with making the change."

To which you replied:

"Not a typo. We should talk."

Markel replied that she would call you. (i) What did you discuss? (ii) Was this concerning the August 1, 2005, re-evaluation of Mr. Aguirre? (iii) Was the "change" to the merit pay schedule distributed to the members of the Compensation Committee and Linda Thomsen as Ms. Markel proposed? (iv) Why or why not? (v) How many other changes did you make to the merit pay schedule? (vi) Please identify all such changes.

(b) The email between you and Lawrence West (also dated August 1, 2005, but time stamped following you exchange with Ms. Markel) has a subject line of "your voicemail" and has Mr. West responding to you stating he called and you didn't pick up, you responded:

"I'll talk to you tomorrow -- personnel issue."

(i) What was the "personnel issue" you sought to discuss with Mr. West?

(ii) Did it relate in any manner to the supplemental re-evaluation of Mr. Aguirre prepared on August 1, 2005? If so, please provide a detailed explanation of your conversations with Mr. West regarding this email.

Answers

(a) As far as I can recall, the email with Susan Markel had nothing to do with Mr. Aguirre. At some time either during the Compensation Committee meeting in July or thereafter, I learned that the supervisors' written evaluation should not contain words such as "Highest" and "High." Because I was told to remove that language before transmittal of the merit pay packages, I was trying to contact Susan Markel, the Division of Enforcement's Chief Accountant and the coordinator for the Division's Compensation Committee, to ask whether my changes had been incorporated into the written evaluations. Since Ms. Markel had charge of the final

packages, I wanted to make sure that the changes had been made and were put into the final report. I spoke to Ms. Markel and resolved that issue.

(b) As far as I can recall the email with Mr. West had nothing to do with Mr. Aguirre. I believe that my email to Mr. West related to another personnel matter, which concerned trying to find a position for a staff lawyer who had been on medical leave.

Question 2

(2) During your time with the SEC, while you were a member of the compensation committee, (a) how many supplemental re-evaluations were submitted to the committee as part of the evaluation process? (b) How many of these reevaluations did you review? (c) Did these re-evaluations change the decision of the compensation committee?

Answer

As of the summer of 2005, the Compensation Committee procedure was fairly new. The committee had been in existence for three years. Although, as I testified, additions to evaluations entitled "supplemental evaluation" were rare, it was not unusual for changes (either positive or negative) to be made to an evaluation. It was also not unusual, after some discussion, for the Compensation Committee or the Director of Enforcement to change the recommendations of a particular Assistant Director.

Judiciary Committee: Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?

Questions for the Hearing Record
Questions from Senator Specter

1. In your supervisory statement concerning Mr. Aguirre, you wrote, "Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. . . . He has consistently gone the extra mile, and then some." (Kreitman 9/6/06 Tr. at 154-155, SEC 00037). Did you, indeed, believe those statements to be true when you signed the supervisory recommendation to the Compensation Committee?

Yes, I believe that the supervisory statement I signed, covering Mr. Aguirre's performance from January 18, 2005 through April 30, 2005, was accurate. I also believe that the statement was incomplete. Although I did write in the statement that Mr. Aguirre could work to enhance the effectiveness of his communications with his supervisors and co-workers, I could, and in retrospect perhaps should, have included that he had acted unprofessionally in dealing with other SEC attorneys.

Also, before I wrote the statement I did not solicit feedback from Mr. Aguirre's former supervisors about Mr. Aguirre's performance before he began working under my supervision. I subsequently spoke with one of Mr. Aguirre's former supervisors, and he informed me that he had significant problems in communicating with and supervising Mr. Aguirre. Had I solicited that information earlier, I would have included it in my statement.

2. Mr. Hanson, in an August 4, 2005 email to you, while referring to a conversation the previous evening, Mr. Aguirre claims to have "told you that the decision not to take Mack's testimony because of his powerful political connections was the event that triggered" Mr. Aguirre's decision to resign from the SEC. He goes on to paraphrase your conversation with him in which Mr. Aguirre claims "you told me that Mack was 'an industry captain,' that he had powerful contacts, that Mary Jo White, Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call Linda [Thomsen] about the examination."

a. Is there any truth to Mr. Aguirre's version of this conversation you had with him on August 3, 2005?

b. What about Mr. Aguirre's characterization is false?

By the time my August 3 meeting with Mr. Aguirre took place, Mr. Kreitman had decided it was not yet appropriate to subpoena Mr. Mack for testimony based on the lack

of evidence that Mr. Mack possessed material non-public information about the Heller merger with General Electric. Mr. Kreitman decided further factual development was necessary before taking the testimony of Mr. Mack. I have no reason to believe the decision had anything to do with Mr. Mack's political connections. Until I read about them in the *New York Times* in June 2006, I did not know anything about Mr. Mack's political connections, nor had I discussed his political connections with anyone at the Commission.

I did know that Mr. Mack was a prominent Wall Street executive and I may well have used those or similar words to describe him (I have made similar statements about other individuals we have taken testimony from in my Enforcement group, including the head of Pequot, Arthur Samberg, whose testimony we took a number of times). I was confident Mr. Mack would retain experienced SEC counsel who could, as is not uncommon, attempt to communicate with my superiors (including Associate Director Paul Berger and Director of Enforcement Linda Thomsen). Accordingly, consistent with my general practice to have my superiors learn about issues in my cases from me rather than from outside sources, I had informed Mr. Kreitman that we were considering taking Mr. Mack's testimony.

I believe Mr. Kreitman's decision not to authorize Mr. Aguirre to take Mr. Mack's testimony was based solely on the merits. I expressed this belief to Mr. Aguirre more than once, including in emails that I sent to him.

Mr. Aguirre also claimed in his August 4 email that one reason for his decision to leave the Commission was that Mr. Kreitman was not accepting Mr. Aguirre's proposed steps in the Pequot investigation, which Mr. Aguirre believed was traceable to an EEO complaint that he had filed. I have no reason to believe this charge against Mr. Kreitman. I do know that Mr. Aguirre had told me in approximately July 2005 that he had expected to work as a partner with Mr. Kreitman at the Commission and had been disappointed when that did not occur. Mr. Aguirre also told me in July that he felt he could no longer speak with Mr. Kreitman, which I believed would make it very difficult for Mr. Aguirre to function effectively under Mr. Kreitman's supervision.

3. **Mr. Hanson, in response to Mr. Aguirre's August 4, 2005 email to you, you wrote, "Mack's counsel will have 'juice' as I described last night – meaning they may reach out to Paul [Berger] and Linda [Thompsen] (and possibly others)." Do you think the mere fact that Mr. Mack's counsel might have had 'juice' was sufficient reason not to subpoena his testimony? Does the SEC have a different standard for subpoenaing the testimony of prominent individuals?**

I do not, and did not, think the fact that Mr. Mack's counsel might have had "juice" was a reason not to subpoena his testimony. Moreover, in my experience, the SEC's Division of Enforcement has never considered the status of an individual's counsel in deciding whether to take an individual's testimony, nor has anyone ever asked or suggested that I refrain from taking a person's testimony because of his or her prominence, status, choice of counsel, political clout, political affiliation, or wealth.

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Attorney Work Product

I do believe that it is important in all investigations to take critical witness testimony at the appropriate stage of the investigation, after adequate preparation and careful planning. I attempt to follow this process in every situation.

As I tried to explain in my interviews with your staff, while it was Mr. Kreitman's decision not to subpoena Mr. Mack pending further factual development, it made sense to me to get our "ducks in a row" before taking that testimony, considering that we were assessing his personal culpability. This was particularly true after Mr. Aguirre made inaccurate or unsubstantiated assertions about Mr. Mack, had exhibited erratic behavior in the workplace, and, according to a staff attorney whose judgment I highly value and respect, had been disorganized and unprofessional in taking the testimony in June 2005 of Mr. Samberg. (Parenthetically, though I was asked during the Senate Hearing to respond to Hilton Foster's assessment of this testimony, Mr. Foster did not attend that testimony). I had become increasingly concerned that Mr. Aguirre was simply interested in attempting to make headlines without properly gathering and objectively evaluating all of the necessary information before taking Mr. Mack's testimony.

4. **On page 3 of your testimony for the December 5, 2006 Judiciary Committee hearing you state that "on at least one occasion the same idea [Mr. Aguirre] rejected dismissively when made by another attorney became an idea Mr. Aguirre later presented as his own." What was that investigative idea? Why did you not raise the issue of Mr. Aguirre's investigative plagiarism with my staff during your on-the-record interviews on September 5, 2006 and November 9, 2006?**

During the summer of 2005, Mr. Aguirre spent significant time on an issue regarding a subpoena he had sent requiring the production of emails from an entity formerly associated with Pequot. Mr. Aguirre addressed the issue with Pequot rather than the other entity. Another attorney suggested that it made sense not to try to sort out the legal obligations between the entity and Pequot, but just to require the entity to respond to the subpoena. I understood that Mr. Aguirre reacted angrily to this suggestion, arguing that it would hurt the staff's ability to get the related entity's cooperation later. Subsequently, Mr. Kreitman suggested requiring the related entity to respond to the subpoena to Mr. Aguirre and Mr. Aguirre responded that that had been his suggestion all along. As for my interviews with your staff, I did my best to answer the questions that were asked.

Judiciary Committee: Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?

Questions for the Hearing Record
Questions from Senator Grassley

(1) At the hearing before the Judiciary Committee, you testified that there were a number of problems surrounding Mr. Aguirre's ability, performance, and conduct while he was employed as a Senior Attorney at the SEC. One of the problems we have had with this matter is the lack of contemporaneous documentation that corroborates the negative performance of Mr. Aguirre. The only such documentation we have is the negative re-evaluation that was prepared by you and Mr. Kreitman (at the request of Mr. Berger).

(a) Why is there such little documentation regarding the negative performance traits of Mr. Aguirre?

(b) Please identify any documents that you feel corroborate the negative statements surround Mr. Aguirre's performance and conduct while employed at SEC.

(a) Mr. Aguirre was a probationary employee who could be discharged for any legally acceptable reason. I was not trying to create a paper trail to justify action against Mr. Aguirre. I was trying to do what was best for the Commission in dealing with an extremely difficult employee.

I understood that Mr. Berger and Mr. Kreitman both had conversations with Mr. Aguirre about his behavior and I too spoke with Mr. Aguirre about improvements I expected from him. Around the time that we were considering whether to terminate Mr. Aguirre in late August 2005, I spoke to one of Mr. Aguirre's former supervisors and found that he also had significant problems in communicating with and supervising Mr. Aguirre.

At that point, based on Mr. Aguirre's overall conduct and my belief it was unlikely to improve, I had no qualms about recommending that he be terminated during his probationary period.

(b) The following documents directly concern Mr. Aguirre's conduct and performance: (1) supplemental evaluation of Mr. Aguirre written on August 1, 2005; (2) email from Mr. Kreitman to Mr. Berger regarding workplace behavior problems of Mr. Aguirre dated August 24, 2005; (3) termination letter sent to Mr. Aguirre on September 1, 2005. Other documents that have been provided to your staff reflect Mr. Aguirre's difficulty or unwillingness to interact appropriately with his colleagues in the Division of Enforcement.

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(2) What facts did the SEC learn following September 2, 2005 that led the SEC to believe that John Mack had gone "over the wall", in accordance with the perquisite required by Mr. Kreitman, that led the SEC to take the testimony of John Mack?

We did not learn any additional facts after September 2, 2005, that led us to believe that Mr. Mack had received non-public information about the merger between Heller Financial and General Electric (which Mr. Kreitman referred to as being "over the wall") before Pequot began purchasing Heller stock on July 2, 2001. In fact, the opposite occurred. We learned that Credit Suisse First Boston was not even engaged by Heller until July 17, 2001, approximately two weeks after Pequot began purchasing Heller stock. The staff also received documents from Credit Suisse, and the documents did not suggest that the individuals from Credit Suisse Mr. Mack met with before he joined Credit Suisse on July 12, 2001, had information regarding the merger between Heller and General Electric. Moreover, we learned that Arthur Samberg, who made the decisions to purchase Heller stock, and was a friend of Mr. Mack, did not even know about Mr. Mack joining Credit Suisse until after it was publicly announced. Collectively these facts, together with the representation Credit Suisse counsel made to Mr. Aguirre in August 2005, that the Credit Suisse CFO who met with Mr. Mack before Mr. Mack joined the firm did not have information on specific pending deals on which Credit Suisse was working, caused us to believe it was extremely unlikely that Mr. Mack had gone "over the wall."

The decision to take Mr. Mack's testimony was made by my superiors within the Division of Enforcement. As I described in my written testimony to the Committee, a consideration in taking Mr. Mack's testimony in Summer 2006 was the harm Mr. Aguirre had caused, by taking this confidential, non-public investigation public for his own purposes, and the need to maintain public and investor confidence in the work of the Division of Enforcement.

(3) Describe in detail what steps SEC took to investigate the facts surrounding Mr. Mack's investment in "Fresh Start" which later became Celiant Corporation. In complying with this request, include responses to the following:

a. Did SEC determine the amount and date of Mr. Mack's investment in Celiant Corporation? Please explain.

b. Did SEC determine the amount of cash Mr. Mack received in connection with Andrews Corporation's acquisition of Celiant and the date he received such cash? Please explain.

c. Did SEC determine the amount of stock Mr. Mack received in connection with Andrews Corporation's acquisition of Celiant? Please explain.

d. Did the SEC determine what legitimate benefit, if any, Pequot received in exchange for allowing John Mack to participate in the investment? Please explain.

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Attorney Work Product

e. Did the SEC determine whether John Mack's participation in the deal diluted Pequot's profit or caused any other detriment to Pequot? Please explain.

We were investigating potential insider trading by Pequot, including whether Mr. Mack had passed information to Pequot about a pending merger between Heller Financial and General Electric. During the investigation we learned that Mr. Mack and Mr. Samberg were friends, that Mr. Mack made at least two private company investments with Pequot during 2001, and that Mr. Mack had also invested in Pequot funds. But we were unable to establish that Mr. Mack had information about the Heller merger with GE before Pequot began purchasing Heller stock. After reviewing Pequot emails suggesting that Mr. Mack spoke with Pequot employees about investing in Celiant Corp. (also referred to as Freshstart) in the days before Pequot began purchasing Heller stock, we questioned Mr. Mack about his investment in Celiant during his testimony to the staff.

(a) Mr. Mack testified that he thought he had invested $5 million in Celiant when it was a private company and SEC filings reflect that he did in fact purchase $5 million worth of Celiant stock on October 15, 2001, when Celiant was a private company. SEC filings reflect that Lucent Technologies and Pequot both invested in Celiant and that Pequot funds purchased $50 million of Celiant stock. The filings reflect that Mr. Mack paid the same stock price per share in Celiant as Pequot did.

(b), (c), (d), (e) SEC filings reflect that Celiant was acquired by Andrew Corp., a publicly-traded company, in February 2002. Andrew Corp. issued stock and cash to Celiant shareholders. Mr. Mack testified to the staff that his investment in Celiant doubled, and that he still owned stock in Andrew Corp. Mr. Mack further testified that he was able to purchase shares in Celiant because Pequot's investment in Celiant was the maximum it could make in a private company. Mr. Mack testified that Celiant also needed more money. We did not verify the profit Mr. Mack realized or recognized on his Celiant purchase or the amount of stock or cash Mr. Mack received when Celiant was acquired by Andrew Corp. Nor did we verify the loss Mr. Mack claimed he incurred on the other private investment he made with Pequot in 2001. The staff did not find that Pequot or Lucent Technologies received any benefit because Mr. Mack was also able to invest in Celiant at the same price offered to Pequot, or that Mr. Mack's purchase of Celiant stock caused detriment to either Pequot or to Lucent. Devoting additional resources to these issues would have provided little assistance in proving an insider trading case against Pequot or Mr. Mack given that we found no evidence that Mr. Mack had any information about the merger between GE and Heller before Pequot began purchasing Heller.

Judiciary Committee Hearing: Illegal Insider Trading: How Widespread is the
Problem and is there Adequate Criminal Enforcement?
Questions for the Hearing Record
Questions from Senator Grassley:

For Mr. Mark Kreitman
Assistant Director, Enforcement Division
U.S Securities and Exchange Commission

(1) At the hearing before the Judiciary Committee, you testified that there were a number of problems surrounding Mr. Aguirre's ability, performance, and conduct while he was employed as a Senior Attorney at the SEC. One of the problems we have had with this matter is the lack of contemporaneous documentation that corroborates the negative performance of Mr. Aguirre. The only such documentation we have is the negative re-evaluation that was prepared by you and Mr. Hanson (at the request of Mr. Berger).

(a) Why is there such little documentation regarding the negative performance traits of Mr. Aguirre?

ANSWER: Mr. Aguirre was in my group for the seven months from late January through August 2005. I, together with his other supervisors, had a number of meetings with Mr. Aguirre to discuss with him problems related to his performance and conduct. Since he was a new member of my group, I was reluctant to formally document those problems until late in his probationary year, in the hope that he would adjust to the Commission's supervisory structure and collegial working environment and that his behavioral difficulties would abate, particularly in light of the fact that, since a hiring freeze was in place, it was unlikely that I would be able to replace him if he were terminated before the end of his probation, which, in fact, is the current status.

(b) Please identify any documents that you feel corroborate the negative statements surround Mr. Aguirre's performance and conduct while employed at SEC.

ANSWER: These documents have been produced to your staff, including but not limited to my August 24, 2005 email to Paul Berger, two August 24, 2005 emails from Mr. Aguirre to Mr. Hanson and myself complaining about his colleague Mr. Eichner, email traffic between Mr. Aguirre and Mr. O'Rourke, and Mr. Aguirre's supplemental evaluation, and written termination notice. In addition, many of Mr. Aguirre's emails which have been produced evidence his single-minded determination to examine Mr. Mack on his own time schedule without regard to standard investigative procedures, the absence of sufficient evidentiary basis for invocation of compulsory process, or – despite his inexperience working with the federal securities laws and lack of any background whatever in government or public service --the considered judgment of his supervisors based on 40 years of combined Commission and more than 50 years of combined government service and experience.

(2) During your time as an Assistant Director at the SEC, how many supplemental re-evaluations have you prepared?

ANSWER: Two.

(3) How many additional negative re-evaluations are you aware of outside of those that you prepared for Mr. Aguirre and Mr. Swanson?

ANSWER: My knowledge of the evaluation process is limited to my personal participation in the three ratings cycles during which I have been an Assistant Director – one prior to the cycle in which I evaluated Mr. Aguirre, that cycle, and one subsequent. I prepared negative supplemental evaluations for two employees during that time.

(4) What facts did the SEC learn following September 2, 2005 that led the SEC to believe that John Mack had gone "over the wall", in accordance with the perquisite required by Mr. Kreitman, that led the SEC to take the testimony of John Mack?

ANSWER: None. The decision to take Mr. Mack's testimony was taken (a) to ensure that, after all proper prerequisite document collection and examination had been completed and other appropriate testimony taken, all possible leads had been explored prior to closing the investigation, and (b) to allay at least to some degree what was perceived to be potential adverse impact on public confidence in the Commission's oversight of the markets as a result of Mr. Aguirre's false and misguided allegations.

Questions from Senator Specter:

1. Mr. Kreitman, I've asked Mr. Hanson about the supervisory statement he signed concerning Mr. Aguirre. My staff informs me that you have seen that narrative as well. My question to you is, did you concur with Mr. Hanson's evaluation of Mr. Aguirre and the recommendation that Mr. Aguirre receive a merit increase?

ANSWER: I concurred with Mr. Hanson's evaluation of Mr. Aguirre as augmented by the supplemental evaluation. And, for the reasons I mentioned during my testimony and interviews with your and Senator Grassley's staff, I concurred in the decision to award Mr. Aguirre the merit increase for his energetic work from late January through the end of April 2005 and to encourage him as a new employee after his troubled beginning in another group. The accumulation of behavior that required Mr. Aguirre's termination occurred subsequent to April.

2. Mr. Kreitman, I understand you were Mr. Aguirre's thesis advisor at Georgetown University Law School. Based upon that experience and his work at the SEC, did you have confidence in his writing abilities and legal acumen?

ANSWER: Supervising Mr. Aguirre's preparation of a law school paper did not afford me sufficient basis to assess his judgment (legal or otherwise), willingness to accept supervision within a structured institutional environment, ability to work constructively with colleagues, or emotional stability, all of which, rather than his legal writing ability, were the bases for the difficulties he encountered at the Commission. I did, however, form the belief that Mr. Aguirre was a smart lawyer.

3. What, if anything, went wrong in the investigation of this very large hedge fund?

ANSWER: The Pequot investigation was conducted in the regular way. Only Mr. Aguirre's behavior went wrong.

4. On page 15 of Mr. Aguirre's December 5, 2006, testimony he sets forth the standard employed for issuance of other subpoenas he generated while at the SEC:

   "Until Mack, I merely informed my superiors who I intended to subpoena and invited their feedback. For example, on February 18, 2005, I emailed Hanson and Kreitman informing them of my intention to subpoena twenty-seven individuals. Of those twenty-seven, seventeen were employed by PCM, five were officers of public companies (including the CEO and CFO of one company), and another five were investment bankers. In general, the person subpoenaed was suspected of giving or receiving material nonpublic information. Neither Kreitman nor Hanson asked why I had decided to issue any of the subpoenas. Neither requested that I make any factual showing why the witness was believed to have received or provided material

nonpublic information. Indeed, neither Hanson nor Kreitman even responded to my email."

If this was the typical response to Mr. Aguirre's request to issue subpoenas, why was the subpoena request to John Mack any different?

ANSWER: The proposed subpoena to Mr. Mack was different from the typical request to issue subpoenas because in that instance the investigation had not developed sufficient evidence to justify the invocation of compulsory process. But my decision to decline to authorize issuance of a subpoena to Mr. Mack was far from unique; to the contrary, I had on a number of previous occasions declined to approve staff requests to issue subpoenas when the evidence did not, in my judgment, so warrant. Of the five individuals referenced in Mr. Aguirre's February 18, 2005 email whose testimony was in fact taken, three were Pequot traders, two the CEO and CFO respectively of an issuer that Mr. Aguirre believed passed material nonpublic information to Pequot and on the basis of which it traded. Thus, all five were persons who, unlike Mr. Mack, either possessed inside information or were thought to have possibly traded on it. Issuing subpoenas to persons in these circumstances is not unusual. Moreover, Mr. Aguirre had not, by this date, exhibited the behavior that required closer supervision over his conduct.

Senator Specter
Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity
December 5, 2006

Questions for Eric Ribelin (Branch Chief, SEC Market Surveillance):

1. When you spoke with my staff, you said that Mr. Aguirre was "one of the smartest, most tenacious, intelligent, thoughtful lawyers I had worked with in 18 years" and that "he was aggressively, but appropriately, pursing an investigation." [Tr. p. 20] Please identify your bases for making this statement regarding Mr. Aguirre.

Response to Question 1.

In my eighteen years in the SEC Enforcement Division ("Division"), I've had the pleasure of working with a great many dedicated lawyers. Over the last five years, I've supervised a team of dedicated and experienced investigators. My assessment of Mr. Aguirre's performance (quoted in the question above) is without qualification and is based on my observation and assessment of his work ethic, work product and demeanor while working together on the investigation that has become one of the subjects of your inquiry.

Let me specifically address my comment that Mr. Aguirre was "...aggressively, but ***appropriately***, pursuing an investigation [emphasis added to the original]." I felt it was important to indicate that the attempt to aggressively investigate should not be construed in anyway as inappropriate or unprofessional. In order to obtain the truth in the investigative process it is incumbent upon the investigator – always working within the boundaries of propriety, of course – to proceed aggressively.

2. When my staff interviewed you in September, you said "I have seen many, many times where ... the staff is aggressive at the beginning, and then maybe a little less aggressive as time goes on." Why do investigators become less aggressive over time? Does it have anything to do with resistance from supervisors like you encountered in the Pequot investigation? Does the SEC's enforcement culture make it hard for investigators to bring cases against well-represented, prominent persons?

Response to Question 2.

Although investigations often become less aggressive over time due to such factors as pushback from opposing counsel and the effects of attrition, the roadblocks encountered in the Pequot investigation were of a different kind and degree. We encountered very aggressive tactics by opposing counsel and a troubling lack of support for an aggressive

investigation by supervisors in the Division. This was the first time in my eighteen-year tenure that I had encountered first-hand such a confluence of events. Notwithstanding the exceptional difficulties presented, Mr. Aguirre, as I've said, continued to attempt to investigate with the same tenacity throughout his employment.

Over the years, I've heard of a few instances of investigations that were, to the dismay of staff, stalled or watered-down. I don't believe, however, that the enforcement culture necessarily makes it difficult to bring cases against well-represented, prominent persons.

3. While speaking with the Committee staff, you said that "maybe reasonable minds could have disagreed – do we take [John Mack's testimony] now or do we get a few more things before we take him." [Tr. p. 46] But you also said that "[I]t seemed to come down as *fait accompli*, we're not going to take his testimony." [Tr. p. 46] Please tell the Committee why you felt that the decision had already been made, and whether you felt the decision was politically motivated.

Response to Question 3.

The decision not to take Mr. Mack's testimony, or indeed to ask a few questions over the phone, was made away from Mr. Aguirre and me and without consulting us. The decision which came on the heels of a series of troubling events, including the fact we were excluded from the decision-making process, suggested forces at work beyond our knowledge and control.

I believe reasonable minds could have disagreed whether we took Mr. Mack's testimony at the point in time suggested by Mr. Aguirre, or at some point soon thereafter. However, after my discussions with Mr. Hanson and Mr. Kreitman – after the decision came down not to question Mr. Mack – I never had the sense they intended to move in that direction. Indeed, Mr. Hanson never responded to the suggestion that we simply call up Mr. Mack – a compromise that presumably would have alleviated the concern he articulated to me. And Mr. Kreitman suggested an exercise in futility when he indicated we needed to determine whether Mr. Mack was over-the-wall.

Furthermore, the case seemed to proceed in a halting and unproductive manner after the firing of Mr. Aguirre. My September 8, 2005 e-mail [Exhibit 9; SEC Bate's stamp 000851] to Mr. Hanson in which I asked why they were "fixated" on whether the size of the trading was "aberrational," captured some of my frustration. I was also concerned that something untoward had happened, and may have been happening at the point I e-mailed him shortly after on that same evening and said I had "serious misgivings" about the investigation and that "something smells rotten." Events prior to the decision not to question Mr. Mack, and indeed, how the investigation unfolded after the firing of Mr. Aguirre informed my suspicion that the decision had been a foregone conclusion.

What drove the decision not to take Mr. Mack's testimony, or to ask a few questions over the phone? I don't know. Who ultimately made the decision and was it politically motivated? Again, I don't know. I only have a few pieces of the puzzle, because I was kept out of the loop. Notwithstanding the great deal of time my staff and I dedicated to this matter, I was excluded from the decision-making process.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
INSPECTOR GENERAL

BY HAND DELIVERY

January 12, 2007

Mr. Barr Huefner
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Huefner:

I am responding to several questions I received from Senators Arlen Specter and Charles Grassley related to the December 5, 2006 hearing on "Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity." I am enclosing those responses, as well as a written statement, all of which I request be made a part of the hearing record.

As requested, I am sending my response to those questions to your attention, and have also sent an electronic version to you at Barr_Huefner@Judiciary-rep.senate.gov.

If you have questions or need to contact me. I can be reached at 202/551-6037.

Sincerely,

Walter Stachnik

Walter Stachnik
Inspector General
Securities and Exchange Commission

Attachments

cc: The Honorable Arlen J. Specter, Ranking Member, Committee on the Judiciary
The Honorable Charles Grassley, Ranking Member, Committee on Finance
The Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary
The Honorable Max Baucus, Chairman, Committee on Finance
Jane Cobb, SEC Office of Legislative Affairs
Peter Uhlmann, SEC Office of the Chairman

Statement of SEC Inspector General Walter Stachnik
"Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity"
Hearing on December 5, 2006

I am pleased to provide this statement and to respond to the questions posed as a follow-up to the Senate Judiciary Committee hearing on December 5, 2006, on the subject of "Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity."

The Securities and Exchange Commission (SEC) Office of Inspector General (OIG) is responsible for investigating allegations of misconduct by SEC staff or contractors. It is important that all SEC personnel conduct themselves professionally, impartially and objectively and that their official actions reflect the merits before them. To that end, the OIG thoroughly investigates allegations of misconduct by Commission staff and does so independently and impartially.

During my tenure as Inspector General, I have served six Chairmen, including members of both political parties. The OIG has conducted investigations of Commissioners, senior executives and officers, and division and office heads. We approached these investigations objectively and on the merits, regardless of the individuals involved. Based on our investigations, senior officials and managers have been terminated, or resigned or retired, or have been reassigned or reprimanded.

Allegations of political influence have been raised regarding the Division of Enforcement's (Enforcement's) investigation of the hedge fund Pequot Capital Management (PCM). A former Enforcement attorney, Gary J. Aguirre, alleged that a suspected tipper received preferential treatment because of political considerations and that the former attorney was terminated in retaliation for complaining about the alleged preferential treatment. The OIG investigated those allegations and found them to be unsubstantiated.

As Inspector General, I recognize my duty to report to Congress and respect the oversight of the Senate in this matter. I have cooperated fully with the Committees by: responding as quickly as possible to requests for documents and information; obtaining authorization from the Commission to disclose non-public materials to the Committees; authorizing OIG staff to be interviewed by Committee staff; appearing before the Judiciary Committee on December 5, 2006; and cooperating fully and timely with the Government Accountability Office evaluations requested by the Senate.

Mr. Aguirre's initial letter to SEC Chairman Christopher Cox raised serious allegations of misconduct by senior SEC officials, and the OIG opened an investigation promptly upon receiving that letter. We subsequently expanded the scope of the investigation when we received a second letter from Mr. Aguirre to Chairman Cox. We conducted the investigation in good faith, following professional standards and guidelines. I assigned a senior attorney to investigate the matter. She was not subject to any extraneous pressure or influence and conducted the investigation independently and impartially. Moreover, this attorney's work was reviewed both by me and the Counsel to the Inspector General, who has extensive experience in conducting internal investigations.

Although reasonable people can disagree on methods and evidence, I believed the initial investigation of Mr. Aguirre's allegations was professional and independent.[1] At the time, I thought we knew enough about Mr. Aguirre's allegations from his two letters to Chairman Cox to investigate them. In hindsight, however, I realize I should not have relied so heavily on the two letters to identify Mr. Aguirre's concerns and that it would have been better for us to interview him. I am responsible for the decision to close the initial investigation without interviewing Mr. Aguirre.

As a result of new allegations and information and the concerns expressed by Senators Specter and Grassley about shortcomings in our initial investigation, and at the request of Chairman Cox, I decided to reopen the investigation. Neither I nor the OIG is infallible. We take seriously the concerns expressed during the oversight process and will rectify any errors or omissions made in the initial investigation. I have made the reopened investigation a matter of priority. The current investigative approach is very comprehensive, and the OIG is dedicating significant resources to it. We will examine all of the evidence objectively and thoroughly, and we will decide whether the evidence warrants referral of the matter, without regard to outside influences.

The OIG subpoenaed documents from Mr. Aguirre in the reopened investigation because he would not voluntarily produce relevant documents and we could not obtain them from other sources. We must ensure that we have all of the relevant information needed to conduct a thorough investigation of Mr. Aguirre's allegations. The subpoena was in no way punitive or retaliatory. Rather, we took this action as a last resort, after numerous attempts to obtain the information on a voluntary basis. Although Mr. Aguirre wrote a 42-page letter, with attachments, to Senator Shelby on August 21, 2006, he refused to provide that or any other documentary or testimonial information to the OIG on a voluntary basis. Only after the Department of Justice filed the subpoena enforcement action on the OIG's behalf did Mr. Aguirre provide us with his letter to Senator Shelby, with the attached documents.

I am pleased to report that we recently reached a settlement with Mr. Aguirre that we believe will meet the needs of the OIG and accommodate the interests of Mr. Aguirre and the Senate. Under this settlement, Mr. Aguirre is not required to produce copies of his communications with the Senate Committees, but only pre-existing materials that support his allegations regarding the PCM investigation and his termination. As a consequence, the document production required by the settlement will not intrude upon any communications Mr. Aguirre may have had with the Senate Committees.

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[1] The initial investigation led to an OIG audit of Enforcement's general compliance with performance management procedures. Preliminary results of that audit indicate that Enforcement: (1) did not consistently perform parts of the performance appraisal process, especially for new, reassigned and detailed staff; and (2) failed to retain performance documentation for the required time. We also found that the SEC's written policies and procedures did not provide adequate guidance regarding the performance management process. We are recommending that Enforcement ensure its supervisors adhere to the required process and that the Office of Human Resources (OHR) improve its written guidance and provide additional training. Enforcement and OHR management have preliminarily indicated that they recognize the need for improvement in these areas and plan to take the necessary corrective actions.

Responses of SEC Inspector General Walter Stachnik
to Questions from Senator Specter
"Examining Enforcement of Criminal Insider Trading and
Hedge Fund Activity"
Hearing on December 5, 2006

1. **Has your staff interviewed John Mack to ascertain whether he personally exerted any political influence to dissuade SEC managers within the Enforcement Division from seeking his testimony? Why not?**

   In order to protect the confidentiality and integrity of the Securities and Exchange Commission (SEC) Office of Inspector General's (OIG's) open investigation into allegations made by former Division of Enforcement (Enforcement) attorney Gary J. Aguirre, it is not appropriate for me to detail publicly the steps of an investigation that is still in progress. I can assure the Senate Judiciary Committee that we are performing a thorough investigation into Mr. Aguirre's allegations, including the allegation that John Mack exerted political influence to dissuade SEC Enforcement managers from taking his testimony.

2. **On average, how many investigations does the SEC Office of Inspector General conclude in a year?**

   During the last five fiscal years (2002 through 2006), the OIG completed an average of approximately 22 investigations per fiscal year.

   a. On average, how many tips or complaints does your office receive annually?

   During the last five fiscal years (2002 through 2006), the OIG received an average of approximately 100 complaints per fiscal year, including complaints from both internal and external sources.

   b. Do you have sufficient staff to investigate all of the serious allegations of misconduct that come to your attention?

   The OIG's investigations section is currently understaffed. We have expended, and continue to expend, a significant amount of resources on the investigation of Mr. Aguirre's allegations and responding to the inquiries of the Senate Judiciary and Finance Committees. In order to ensure that all serious allegations of misconduct are thoroughly investigated, I am currently exploring several alternatives, including having other Offices of Inspector General perform investigations, obtaining temporary assistance through contracts or details, and using OIG auditors to provide investigative support. If there appears to be a continued need for additional investigative resources, I will request additional staff from the SEC Chairman. I appreciate the concern that the OIG have sufficient resources to perform its investigative function.

Responses of SEC Inspector General Walter Stachnik
to Questions from Senator Grassley
"Examining Enforcement of Criminal Insider Trading and
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(1) During the course of our investigation, it appears to me that your office does not operate as independently of the SEC as it should. For instance:

- **One of your staff spent 8 years in the SEC Office of General Counsel prior to joining the SEC Office of Inspector General (SEC/OIG).**

- **Emails and notes show early consultation on the Aguirre investigation between SEC Office of the General Counsel and the former attorney from that office on your staff. The General Counsel's Office told your staff that they "suspect nothing there" and that Aguirre had filed an EEO complaint, which isn't really relevant to his allegations of preferential treatment for John Mack.**

- **Records show that you, the Inspector General, were forwarding internal OIG emails about Mr. Aguirre to SEC officials outside the IG's office including at least one who was also a subject in your Aguirre investigation: Linda Thom[]sen, the Director of the Enforcement Division.**

(a) Why did you forward internal emails related to Mr. Aguirre to non-OIG staff?

On the evening of June 28, 2006, the Securities and Exchange Commission (SEC) Office of Information Technology (OIT) informed the SEC's Office of Inspector General (OIG) that someone in the Chairman's Office had noticed that former Division of Enforcement (Enforcement) attorney Gary J. Aguirre was still registered in the computerized Outlook address book, raising a question as to whether his computer privileges were properly terminated at the time of his departure from the Commission. *See* documents numbered 000592-93. Early the following morning, Mary Beth Sullivan, Counsel to the Inspector General and Associate Inspector General for Investigations (AIGI), informed me and others within OIG of this development, identifying two issues: (1) whether the account had been used after Mr. Aguirre's departure; and (2) why the account had not been cancelled. *Id.*

I forwarded the information provided by Ms. Sullivan and OIT to Anil Abraham, Counsel to the Chairman; Richard Humes, Associate General Counsel for Litigation and Administrative Practice; Walter Ricciardi, Deputy Director of the Division of Enforcement; and Linda Thomsen, Director of the Division of Enforcement. I did so because, in my view, the security concern was potentially serious enough to warrant the immediate attention of senior personnel in these offices and division. Later that same day, OIT advised that Mr. Aguirre's account had been "disabled" since December 2005. *See* documents numbered 000616-17 and 000621-22. Subsequently, OIT informed Ms.

Sullivan and others that Enforcement, in consultation with the Office of General Counsel (OGC), had taken steps to disable the account in connection with Mr. Aguirre's termination. *See* documents numbered 000059-62.

Please note that, at the time I forwarded the emails in question, the OIG had no pending investigation concerning Mr. Aguirre's allegations, having concluded its initial investigation on November 29, 2005.

(b) Have you done so on other occasions? If so, please identify those instances and explain.

On the morning of June 29, 2006, I forwarded to Messrs. Abraham, Humes, and Ricciardi and Ms. Thomsen an email from Ms. Sullivan to me and other OIG staff, forwarding additional information from OIT indicating that Mr. Aguirre's email account had been disabled in December 2005. *See* documents numbered 000616-17 and 000621-22. I forwarded this email to Messrs. Abraham, Humes, and Ricciardi and Ms. Thomsen because it contained information relevant to the security concern raised in the emails I had forwarded to them earlier that morning.

Other than the instances described above, I recall no other occasions on which I forwarded internal emails related to Mr. Aguirre to non-OIG staff.

(c) In light of all this, why should we believe that your office is independent from the SEC and able to conduct investigations without undue influence?

The OIG is organizationally independent of SEC management, its staff are personally independent, and its investigations are not subject to undue influence.

During my tenure as SEC Inspector General, the OIG has investigated Commissioners and Chairmen, as well as members of senior management. Since 1989, our investigations have led to numerous terminations, retirements or resignations, some involving senior executives. We have also on occasion referred matters involving senior executives to the Department of Justice or other appropriate entities. The OIG is not hesitant to investigate senior managers, and we conduct our investigations on the merits. I am not aware of any attempt by SEC management to influence improperly any investigation during my tenure. In my experience, the agency takes our investigative results seriously and generally acts on them.

To address some of the specific concerns raised in question (1), the OIG is independent of the SEC's OGC. One of the OIG's Associate Counsels, Kelly Andrews, worked in OGC from April 1998 through July 2005. Since July 2005, while Ms. Andrews has been with the OIG under my direct supervision, she has conducted fair, objective and independent investigations. No one from OGC has interfered with or influenced Ms. Andrews in conducting any of the investigations assigned to her, including the investigation of Mr. Aguirre's allegations. Moreover, Ms. Andrews did not

have the authority to close the investigation of Mr. Aguirre's allegations without my approval and the concurrence of another OIG attorney.

The SEC Chairman's Office forwarded Mr. Aguirre's September 2, 2005 letter to Chairman Christopher Cox to the OIG on or about September 30, 2005. OGC had also received Mr. Aguirre's correspondence. On October 6, 2005, Richard Humes and Samuel Forstein of OGC spoke briefly with Ms. Andrews. They indicated that they planned to respond to Mr. Aguirre's letter and provided Ms. Andrews with some background information. My staff informed Mr. Humes and Mr. Forstein that the OIG would conduct an investigation of Mr. Aguirre's allegations. They requested that the OIG inform them of the outcome of the investigation.

Subsequently, on October 12, 2005, Mr. Forstein contacted Ms. Andrews and informed her that Mr. Aguirre had sent a second letter to Chairman Cox, dated October 11, 2005, that made additional allegations. Ms. Andrews then obtained a copy of Mr. Aguirre's October 11, 2005 letter, and the OIG expanded the scope of its investigation to include the allegations contained in that letter. Neither Ms. Andrews, nor anyone else in the OIG, had any further communications with OGC about the investigation of Mr. Aguirre's allegations until we closed the investigation on November 29, 2005. At that time, Ms. Andrews contacted Mr. Humes at my direction to notify him that the OIG had closed its investigation of Mr. Aguirre's allegations.

The communications described above constitute the extent of the OIG's contacts with OGC regarding the OIG's initial investigation of Mr. Aguirre's allegations. Our files contain no emails that "show early consultation" regarding that initial investigation between my staff and OGC. Moreover, the OIG chose promptly to open an investigation notwithstanding any comments or opinions expressed by OGC attorneys concerning the merits of Mr. Aguirre's allegations. I believe that my staff's limited contacts with OGC regarding our initial investigation of Mr. Aguirre's allegations were entirely appropriate and consistent with the independence of my Office. There is no evidence that any OGC attorney interfered with or exerted undue influence on our investigation.

(d) What role does the Office of General Counsel (OGC) play in providing advice and guidance to the OIG?

The OIG operates independently of OGC and has its own Counsel. The Counsel and the two Associate Counsels report directly to me and provide the OIG with independent legal advice and guidance.

From time to time, my staff or I may ask OGC attorneys for information or for their opinion or interpretation of a matter, particularly in legal areas that fall within the expertise of OGC attorneys, such as the Commission's rules concerning the disclosure of non-public information to persons outside the Commission. While my staff and I will consider OGC's views or opinions, we are not bound by them and make independent decisions.

(e) Is advice from OGC solicited by SEC/OIG?

See my response to question 1(d).

(f) If so, please provide detailed examples and explanations why the SEC/OIG has solicited such advice over the past 2 years.

During the past two years, my staff solicited comments from OGC about the action memoranda through which the OIG sought Commission authorization to share non-public information with the Senate Finance and Judiciary Committees in the context of the Aguirre matter. The OGC attorneys are more familiar with the Commission's rules regarding disclosure of non-public information to persons outside the Commission. The OIG accordingly sought their input to facilitate the disclosures sought by the Committees.

In addition, the OIG has recently consulted with OGC attorneys in connection with OIG documents that are at issue in ongoing Freedom of Information Act (FOIA) litigation involving Mr. Aguirre. OGC is representing the Commission in this litigation and has requested information from the OIG in connection with that representation.

(2) The SEC/OIG's website states that the "Office's primary functions are to 1) perform audits of Commission operations, programs, activities, functions, and organizations, and 2) conduct investigations of alleged staff (and contractor) misconduct." [Footnote omitted.] However, in transcribed interviews with a member of your staff, my staff was told, "we don't second-guess management decisions and we don't necessarily look at every unlawful allegation." [Footnote omitted.] Further the testimony stated, "That's not something we normally look at. We don't second-guess why employees are terminated." [Footnote omitted.]

The allegations presented to Chairman Cox, by Mr. Aguirre, in his letters dated September 2, 2005, and October 11, 2005, outline serious charges that his termination from the SEC was improper and related to his continued efforts to pursue an investigation. I have a hard time reconciling these statements against your core mission outlined on your website. How can an Inspector General say his office "Conducts investigations of staff misconduct" and at the same time have employees stating the staff of the OIG does not second-guess management decisions and does not look at every unlawful allegation?

Mr. Stachnik, in light of this testimony from your staff please respond to the following:

(a) How do you reconcile these statements? Does the testimony of your staff represent the policy of the entire SEC/OIG?

I have not been afforded the opportunity to review the transcripts of my staff's interviews and am therefore unable to review the context in which my staff's statements

were made.[1] Nonetheless, as explained below, I believe that the statements quoted in question (2) do reflect the policy of the OIG and are consistent with the description of the OIG's mission on its website.

During its investigation into Mr. Aguirre's allegations, the OIG investigated whether management decisions were made for improper or unlawful reasons, but did not otherwise second-guess the merits of those decisions. For example, the OIG found insufficient evidence that Mr. Aguirre was terminated for complaining about the alleged preferential treatment of John Mack, instead finding evidence that he was terminated for other legitimate management reasons. The OIG did not conduct further inquiry into the merits of those legitimate management reasons or whether another management decision would have been more reasonable. I do not believe that it would be appropriate for the OIG, absent evidence of misconduct, to substitute its own views for those of management, or to second-guess or interfere with decisions made for legitimate, lawful reasons. As we make clear to complainants to the OIG, the OIG is not an appellate body and does not review the merits of agency decisions in the absence of abuse of authority or other misconduct.

Ms. Andrews has informed me that she indicated in her interview with Senate Committee staff that the OIG did not second-guess management's decision to terminate Mr. Aguirre, a probationary employee, once it found insufficient evidence that he was terminated for complaining about the preferential treatment of Mr. Mack, as Mr. Aguirre alleged. This statement accurately reflects of the application of OIG policy in this instance.

The statement that the OIG does not "necessarily look at every unlawful allegation" is also correct. While the OIG reviews all allegations that come to its attention to determine what action, if any, is warranted, many of the allegations that the OIG receives are outside its jurisdiction and are referred to other offices or agencies. For example, the OIG does not investigate allegations of unlawful race, sex or age discrimination and refers those allegations to the SEC's Office of Equal Employment Opportunity (OEEO). Thus, if Mr. Aguirre was alleging that he was terminated because of his age, the OEEO, not the OIG, would have jurisdiction to investigate that allegation.

Ms. Andrews has told me that her statement that the OIG does not "necessarily look at every unlawful allegation" was made in the context of explaining that not all allegations received are within the OIG's jurisdiction. In fact, Ms. Andrews informed me that she specifically explained to Committee staff that if Mr. Aguirre were alleging that he was terminated because of his age, the OEEO, not the OIG, would have jurisdiction to investigate that allegation. Given the context in which Ms. Andrews told me her statement was made, it accurately reflects the OIG's policy.

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[1] After receiving these questions, I sent an email to a Senate Finance Committee staff member requesting copies of the transcripts of my staff's interviews to assist me in responding to your questions. I again made this request in a meeting with another Senate Finance Committee staff member on December 19, 2006. To date, I have not been provided the requested transcripts.

(b) How does the SEC/OIG conduct its core mission of investigating alleged staff misconduct without second-guessing the decisions made by management?

As I explained in my answer to question 2(a), the OIG investigates allegations of staff misconduct by gathering evidence to determine whether statutes, rules and regulations may have been violated, or whether other misconduct occurred. The OIG does not review management decisions to determine whether the OIG might have reached a different decision.

(c) If the SEC/OIG doesn't necessarily look at every unlawful allegation how does the SEC/OIG decide which cases to pursue? What happens to cases that are not pursued?

The OIG investigative staff review every allegation received by the OIG. Based upon a number of relevant factors, the OIG investigative staff decide whether to: (1) open an investigation; (2) open a preliminary inquiry (something less than a full investigation); (3) refer the matter to the OIG audit staff; (4) refer the allegation to another office or agency with jurisdiction over the matter; or (5) take no action. Allegations that are not pursued by the OIG are, where appropriate, referred to another office or agency. If a decision is made that no action or referral is warranted, the incoming complaint is retained in a miscellaneous complaints file for the required time period.

(3) The Privacy Act of 1974 was often cited during the transcribed interviews with your staff as a reason why the SEC/OIG chooses to interview subjects of an investigation prior to interviewing any complainant that brings forth allegations of waste, fraud, abuse, or mismanagement at SEC. More specifically, your staff stated, "There is a provision of the Privacy Act that requires you to elicit information from the subjects first." [Footnote omitted.]

It is my understanding that your staff was referring to section (e)(2) of the Privacy Act of 1974 [footnote omitted] which states,

(e) Agency Requirements

"Each agency that maintains a system of records shall--

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs."

This language does not explicitly require that the subject of misconduct or mismanagement allegations be interviewed before a complainant is interviewed. It merely requires that information in agency records be gathered directly from the subject of those records "to the greatest extent possible." Mr. Aguirre and his

supervisors were all the subject of records gathered by your office during the course of its investigation, so it is unclear how the provision you cite would require you to treat Mr. Aguirre any differently than his supervisors. It appears nothing in this section of the Privacy Act expressly prohibits the Office of the Inspector General from obtaining information from a complainant such as Mr. Aguirre.

(a) Please provide a detailed explanation as to how the Privacy Act requires the SEC/OIG to interview the subjects of an investigation (including criminal investigations) first, before gathering facts from all relevant sources, including a complainant.

It is my understanding, based upon the advice of OIG Counsel, that Section (e)(2) of the Privacy Act of 1974 requires the OIG, in non-criminal cases,[2] to obtain information from the subjects of the investigation first before going to other sources to the greatest extent practicable. As I understand this provision and how it has been interpreted in administrative investigations, the OIG should interview the subject(s) of the investigation first before going to any other sources, including the complainant, to the greatest extent practicable. In its initial investigation of Mr. Aguirre's allegations, the OIG determined that it had sufficient information from Mr. Aguirre's letters to allow it to interview the subjects first before interviewing other witnesses, including Mr. Aguirre. Further, as Mr. Aguirre was not a subject of the OIG's investigation, Section (e)(2) of the Privacy Act did not require us to interview or obtain information from Mr. Aguirre before obtaining information from other sources.

While I have not had an opportunity to review the transcript of Ms. Sullivan's interview, she told me that she informed Committee staff several times during the interview that the Privacy Act provision in question was not an absolute requirement, but contained qualifying language, *i.e.*, "to the greatest extent practicable." Ms. Sullivan also said she provided Committee staff with an example of an investigation in which the OIG did not interview the subject first because is was not practical to do so under the circumstances of that case.

(b) In complying with this request please provide a list of authorities and cite any outside legal opinions used to formulate this position.

The position that I described in my answer to question 3(a) is based upon the following legal authorities: *Dong v. Smithsonian Institution*, 943 F. Supp. 69 (D.D.C. 1996); *Waters v. Thornburgh*, 888 F.2d 870 (D.C. Cir. 1989), *rev'd on other grounds, Doe v. Chao*, 540 U.S. 614 (2004); and Joseph V. Kaplan & John P. Mahoney, *Reckless Disregard: Intentional and Willful Violations of the Privacy Act's Investigatory Requirements*, The Federal Lawyer 38 (May 1997) (copy attached).

[2] The OIG is exempt from Section (e)(2) of the Privacy Act when investigating violations of criminal statutes. *See* 71 Fed. Reg. 31,230, 31,232 (June 1, 2006); 55 Fed. Reg. 1744, 1746 (Jan. 18, 1990).

(4) On August 14, 2006, your office served a subpoena duces tecum upon Mr. Aguirre. This subpoena requested, among other things, confidential communications between Mr. Aguirre and the Senate Finance Committee and the Senate Judiciary Committee. On November 3, 2006, the Department of Justice filed a Motion to Show Cause [footnote omitted] on your behalf in the U.S. District Court for the District of Columbia. This motion[] sought enforcement of the subpoena your office sent to Mr. Aguirre. At the December 3, 2006, Judiciary Hearing you testified regarding the subpoena that you were "advised by the Department of Justice not to comment on that." As a follow-up to your response at the hearing please answer the following:

(a) Who specifically at the Department of Justice advised you not to speak to Congress regarding the subpoena to Mr. Aguirre?

My testimony at the Judiciary Committee Hearing on December 5, 2006, requires some clarification. The Department of Justice (Department) did not advise me "not to speak to Congress regarding the subpoena to Mr. Aguirre," but rather to refrain from commenting publicly on the pending litigation, which I understood to encompass discussions concerning settlement. Attorneys in the Federal Programs Branch of the Department's Civil Division have also told us that this advice is consistent with the Department's standard instruction to client agencies not to comment publicly on pending litigation. This was what I intended to convey during my testimony at the December 5, 2006 hearing, and I apologize if there was any confusion in that regard.

(b) When were you advised not to speak about the subpoena?

On or about November 21, 2006, attorneys in the Federal Programs Branch advised the OIG not to comment publicly on the pending litigation seeking to enforce the subpoena to Mr. Aguirre.

(c) Please provide a list of all individuals who provided advice and counsel to you and your office regarding the issuance of the subpoena to Mr. Aguirre. In responding to this request please provide a list of names, the employer of that individual, the date of the advice, and in the event of a meeting, provide the list of all meeting participants.

I discussed the possibility of issuing a subpoena to Mr. Aguirre with Mary Beth Sullivan, Counsel to the Inspector General and AIGI, and Kelly Andrews, Associate Counsel, shortly after the OIG reopened its investigation into Mr. Aguirre's allegations.

On July 27, 2006, I met with Ms. Sullivan, Ms. Andrews, Nelson Egbert, Deputy Inspector General, and Richard Woodford, Associate Counsel. During that meeting, we discussed, among other matters, the possibility of issuing a subpoena *duces tecum* to Mr. Aguirre if he refused to provide information to us voluntarily and if we were unable to obtain the required information from another source.

In addition, Ms. Sullivan had a brief conversation with an attorney in the Federal Programs Branch of the Department of Justice's Civil Division on August 10, 2006. The purpose of this conversation, however, was not to obtain advice regarding the issuance of the subpoena to Mr. Aguirre. Rather, Ms. Sullivan contacted the Department to discuss what might happen if the OIG needed to have the subpoena enforced in court.

Reckless Disregard: Intentional and Willful Violations of the Privacy Act's Investigatory Requirements

By Joseph V. Kaplan & John P. Mahoney

In a case that serves as a strong wake-up call to federal agencies, the U.S. District Court for the District of Columbia recently ruled in *Dong v. Smithsonian Institution*, that a federal agency was liable for damages to reputation and attorneys fees for recklessly disregarding often-ignored provisions of the Privacy Act by improperly conducting an investigation into allegations of employee misconduct. Agencies have obligations under the Privacy Act when conducting employee investigations. The *Dong* case serves as an example of the consequences of violating those obligations.

In an important case that strengthens the individual Privacy Act[1] rights of federal employees, Judge Gladys Kessler of the U.S. District Court for the District of Columbia ruled in *Dong v. Smithsonian Institution*[2] that the Smithsonian Institution acted with reckless disregard for the Privacy Act rights of its more than 4,000 federal civil service employees when it violated the Privacy Act rights of Margaret Dong in the way that the Smithsonian conducted an investigation into alleged job misconduct. This case concerned the often-ignored requirement in section 552a(e)(2) of the Privacy Act, which requires that agencies must, when conducting investigations into alleged employee misconduct, gather information from the individual first "to the greatest extent practicable."[3] In the *Dong* case, one of Ms. Dong's supervisors heard a rumor of misconduct — that Ms. Dong had taken an unauthorized trip for the agency — the supervisor did not approach Ms. Dong for fear of upsetting her. Rather, Smithsonian supervisors contacted third parties, outside the agency, and questioned them about Ms. Dong's trip, impugning her reputation in the process. The district court held that the Smithsonian acted with a reckless disregard for Ms. Dong's rights under the Privacy Act, and awarded her damages and attorneys fees.

The Privacy Act: Investigatory Requirements

As its name suggests, the Privacy Act is fundamentally concerned with protecting individual privacy.[4] Specifically, the act supports "the principle that an individual should to the greatest extent possible be in control of information about [himself/herself] which is given to the government . . . principle designed to insure fairness in information collection which should be instituted wherever possible." On this point, Congress has stated that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States."[5] When conducting personnel investigations, the Privacy Act requires each agency to "collect information to the greatest

extent practicable from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under federal programs."[7]

The leading case in the District of Columbia Circuit (D.C. Circuit), which construed this provision of the Privacy Act, *i.e.*, 5U.S.C. § 552a(e)(2), is *Waters v. Thornburgh*.[8] In *Waters*, the D.C. Circuit ruled that "[i]n the context of an investigation that is seeking objective, unalterable information, reasonable questions about the person's credibility cannot relieve an agency from its responsibility to collect that information first from the subject." In so holding, the D.C. Circuit found that the legislative history of section 552a(e)(2) of the Privacy Act "reflects congressional judgment that the best way to ensure accuracy in general is to require the agency to obtain information 'directly from the individual whenever practicable.'"[10]

Standards for Liability

In order to be liable for a violation of section 552a(e)(2) of the Privacy Act, the governmental actor must be an "agency that maintains a system of records."[11] Further, in order to be actionable and to justify an award of attorneys fees, an agency's violation of the act must be "intentional or willful."[12] In this regard, the legislative history of the Privacy Act describes the intentional or willful standard in the following manner: "[o]n a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence."[13] Construing this standard in language more helpful to individuals and litigants, the D.C. Circuit has interpreted the "intentional or willful" standard to include an act committed "without grounds for believing it to be lawful, or the flagrant disregard for others' rights under the act."[14] Moreover, in *Tijerina v. Walters*,[15] the D.C. Circuit rejected the government's argument that a plaintiff must show that an agency official acted with the actual intent to violate the act.[16] In applying the correct standard of law, a court must view the agency's actions in their context to determine whether the agency acted in a willful or intentional manner.[17]

Separately, in order to recover under the Privacy Act, the plaintiff must also show that the defendant's violation had an "adverse effect" on the plaintiff. The D.C. Circuit has held that emotional trauma alone is sufficient to qualify as an "adverse effect" under the Privacy Act. The rationale is that emotional trauma is logically the type of adverse effect that flows from a violation of the fundamental constitutional right of privacy.[18]

Once the Privacy Act plaintiff establishes that the agency's intentional or willful violation had an adverse effect on the him or her, the plaintiff is entitled to the greater of either $1,000 or the actual damages sustained in excess of that minimum amount. The showing of actual damages is not a legal prerequisite to the awarding of $1,000 to a victim who has been adversely affected by an intentional or willful violation of the Privacy Act. Rather, a showing of actual damages is only necessary for an award in excess of $1.000.[19]

Notwithstanding, the meaning of the term "actual damages," has traditionally been a matter of contention among the courts. Of course, in construing the "actual damages" provision of the Privacy Act, judicial inquiries must begin with the language of the statute itself. As is widely known, absent a clearly-expressed legislative intent to the contrary, the plain meaning of the language of the statute is ordinarily controlling.[20]

Courts have recognized that the plain meaning of the Privacy Act term "actual damages" is uncertain. Courts have sought illumination in the legislative history of the Privacy Act. Based upon that legislative history, it has been held that victims of intentional or willful violations of the act are entitled to compensation for proven mental and physical injuries, including harm to their reputation, mental anguish, symptoms of sleeplessness, nervousness, and frustration, even when the plaintiff has suffered no lost wages or incurred medical expenses on account of the injuries.[21] In short, the legislative history of the "actual damages" language of the Privacy Act has been best summarized as follows: "[W]hile Congress expressed some concern over the scope of potential government liability for damages under the act, this concern was in no way intended to limit recovery of damages for loss of reputation, embarrassment, and other forms of emotional distress."[22]

Moreover, support for the view that "actual damages" includes emotional distress comes from the language of the Privacy Act itself. The stated purpose of the Privacy Act is set forth in its preamble: "The purpose of this act [enacting this section and notes set out under this section] is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies, except as otherwise provided by law, to . . . be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this act.[23] Support for the recovery of actual damages under the Privacy Act for emotional distress is abundant.[24]

To obtain relief under subsection (e)(2) of the Privacy Act, a plaintiff must establish that (1) the agency failed to elicit information directly from her "to the greatest extent practicable"; (2) the violation of the act was "intentional or willful"; and (3) this action had an "adverse effect" on the plaintiff. If these three factors are satisfied, the plaintiff is entitled to the greater of $1,000 or the actual damages sustained. If these provisions are satisfied, the successful plaintiff is also entitled to receive reasonable attorneys fees. The statute of limitations for a Privacy Act lawsuit is two years, commencing on the date when the plaintiff knows, or has reason to know, of the alleged violation.[25]

(continued on page 40)

Dong v. Smithsonian Institution: Reckless and Damaging Violations of the Privacy Act

In 1994, Margaret Dong brought a civil action under the Privacy Act against her employer, the Smithsonian Institution, for damages due to the Smithsonian's breach of its statutory obligations regarding the collection of employment information under 5 U.S.C. § 552a(e)(2).[26] The district court's jurisdiction was based upon 28 U.S.C. § 1331 and 5 U.S.C. § 552a(g)(1).

As noted in her court complaint, Ms. Dong was employed as a museum registration specialist, GS-9 federal civil servant, by the Hirshhorn Museum and Sculpture Garden (Hirshhorn), a museum within the Smithsonian. Ms. Dong alleged in her complaint that two of her supervisors at the Hirshhorn engaged in an investigation in violation of the Privacy Act by failing to discuss charges of her rumored misconduct with her before commencing the investigation and disclosing the nature of the charges against her to her colleagues outside the Smithsonian. Ms. Dong claimed damages for, *inter alia*, the emotional trauma and the harm to her professional reputation that she suffered as a result of the defendant's actions.

Findings of Fact

Specifically, Ms. Dong's job duties include working with individuals and organizations outside the Smithsonian to arrange for the loan of art objects to other museums. As found by the district court, over the years, Ms. Dong's performance evaluations have been "highly successful and, on occasion, outstanding." When appropriate, Ms. Dong acts as a courier for loan objects in transit.

During the period of Sept. 13-17, 1993, Ms. Dong served as a courier for the Hirshhorn's painting *Circus Horse* by Joan Miro. Ms. Dong accompanied the painting from Barcelona, Spain, to the Museum of Modern Art (MOMA) in New York City, due to her concern over the condition of the painting's frame — a concern that was shared by the shipping company handling the exhibit. Indeed, the shipping company asked Ms. Dong to act as a courier. As the district court found, "[n]othing in the record suggests that [Ms. Dong] did anything but serve as a courier on this trip. Her trip was not for vacation or pleasure." Notwithstanding, Ms. Dong did not obtain the approval of the director of the Hirshhorn for this courier trip. As the court found, "[t]here is no question that the failure to obtain the director's approval was a violation of museum procedures and regulations." Ms. Dong was ultimately suspended for five days for the violation. As the district court also properly recognized, "[t]hat suspension [was] not in issue in [the] lawsuit."[27] As for the reason Ms. Dong did not follow prescribed procedures, the district court stated that it was an unusual one. Specifically, the court fully credited Ms. Dong's testimony on this point, as follows:

> According to [Ms. Dong's] testimony, the reason that she did not seek approval for the trip was related to problems she was having with a co-worker. Apparently, the co-worker caused problems when Ms. Dong was away on couriering duty, but not when she was simply out of the office on annual leave. Therefore, Ms. Dong chose to avoid problems with that co-worker by simply taking annual leave and not letting anyone know that she was acting as a courier for the Miro painting.[28]

During the week of Oct. 18, 1993, the administrator of the Hirshhorn heard a rumor from an employee (not the employee with whom Ms. Dong was having difficulties at the time) that Ms. Dong had taken an unauthorized couriering trip. The Hirshhorn administrator discussed that rumor with the long-time registrar of the Hirshhorn — Ms. Dong's direct supervisor — who, in turn, is supervised by the museum's administrator. The Hirshhorn administrator asked the Hirshhorn registrar to investigate the rumor. The registrar found no evidence of such a trip or its authorization in any of the Hirshhorn files. He then called the registrar of the MOMA and asked MOMA's registrar to check her museum's files. Thereafter, the Hirshhorn's administrator also spoke to MOMA's registrar.

Through telephone calls and faxes to/from the registrar at MOMA, and to another professional colleague of Ms. Dong who was now working at the Metropolitan Museum of Art in New York City (Met), the Hirshhorn's administrator confirmed that, in fact, Ms. Dong had acted as courier during the trip of the Miro painting from Barcelona to the MOMA in New York.

Thereafter, the Hirshhorn's administrator conferred with employees at the Smithsonian in the office of general counsel and in the office of human resources regarding the appropriate procedure to be followed and the appropriate sanctions to be imposed for violation of the rules. At no time prior to contacting any of these people was Ms. Dong herself contacted or interviewed about her alleged misconduct or her version of the events that transpired. Both the Hirshhorn's administrator and its registrar testified that they proceeded without first contacting Ms. Dong, because they hoped to establish that the original rumor was false. In their eyes, that would end the entire incident, and "all unpleasantness would be avoided."

The district court found it apparent from various exhibits as well as the witness testimony, that there were many personnel frictions and problems in the registrar's office at the Hirshhorn. Further, Ms. Dong had discussed and complained about some of them over the years. Even though her competence, integrity, and trustworthiness had never been questioned, it was clear to the district court that both the Hirshhorn's administrator and its registrar did not wish to question Ms. Dong directly about a major professional issue, thus creating further complications in an office already beset with personnel problems. Indeed, they hoped to determine that there was absolutely no factual basis for what was at least in its inception a mere rumor.

The district court also found it was perfectly apparent from the Hirshhorn registrar's testimony and demeanor that he is an administrator who avoids employee confrontation, as well as direct answering of questions, if at all possible. In addition, the court found that the Hirshhorn administrator never even considered what the impact of going outside the Hirshhorn to question strangers, *i.e.*, non-Hirshhorn employees, about the incident in question, might be on Ms. Dong's reputation.

As recognized by the district court, the Smithsonian has always taken the legal position that it is neither covered by the Freedom of Information Act (FOIA) nor by the Privacy Act.[29] However, as the district court pointed out, in 1992, Judge Charles Richey of the U.S. District Court for the District of Columbia had previously held in *Cotton v. Adams*,[30] that the Smithsonian is an agency subject to FOIA and, consequently, the related Privacy Act.[31]

The agency in *Dong* conceded that it never took any action to inform its employees of the holding in *Cotton*, because it believed that case to have been wrongly decided. All of the Smithsonian's employees who testified on the subject at the *Dong* trial testified that they had never received any training or education about the substance or the requirements of the Privacy Act. Further, they testified that it was their understanding that the Smithsonian, including, of course, the Hirshhorn museum, was not covered by the Privacy Act.

Judge Kessler went on to point out that she had independently ruled at an earlier stage in *Dong*, that the Smithsonian is an agency within the meaning of FOIA and the Privacy Act.[32] This ruling agreed with the conclusion of Judge Richey in *Cotton*.

Conclusions of Law

Based on these findings of fact, the district court reached the following conclusions of law. The plaintiff based her claim against the Smithsonian, as previously indicated, on 5 U.S.C. 552a(e)(2) of the Privacy Act, which provides that each agency collect information to the greatest extent practicable from the subject individual when the information may result in adverse determinations.

The district court recognized the mandatory authority of the D.C. Circuit *Waters* decision, and echoed the principle that, as the Privacy Act is fundamentally concerned with privacy, "'it supports the principle that an individual should, to the greatest extent possible, be in control of information about him [or her] — which is given to the government . . . principle designed to ensure fairness in information collection which should be instituted whenever possible.'"

According to Judge Kessler, the *Waters* opinion points out that the agency does not have the option of choosing which source would provide the most accurate information. Based on the district court's analysis of *Waters*, Judge Kessler stated that "[t]he point of the provision in question, namely, 552a(e)(2), is that it, 'reflects congressional judgment that the best way to ensure accuracy in general is to require the agency to obtain information directly from the individual whenever practicable.'"[33]

The district court also recognized and applied the *Office of Management and Budget Privacy Act Guidelines* (*OMB Guidelines*). Specifically, the district court listed several of the *OMB Guidelines*' practical considerations, which had direct bearing on the facts in *Dong*. The *OMB Guidelines* considerations thought to be relevant in *Dong* included the nature of the program. For example the court pointed to instances in which the information can only be obtained from third parties as in criminal investigations (which, of course, *Dong* was not); the costs; the risk that the information collected from the third party, if inaccurate, could result in an adverse determination; the need to ensure the accuracy of information supplied by an individual; and once the agency has determined that it was not practicable to obtain the information from the subject, the provisions for verifying that third-party information with the subject individual.

As found by the district court, the Smithsonian did not allege, nor was there reason in the record to believe, that the plaintiff was not a credible witness. As recognized by the district court, quite the contrary was true, given Ms. Dong's long record of exemplary employment at the Hirshhorn. In addition, there was no evidence that the defendant feared that the plaintiff would either tamper with, falsify, secrete evidence, or coerce or pressure any witnesses into giving false testimony for the same reasons, or that the plaintiff engaged in previous impropriety that would give the defendant reason to question Ms. Dong's veracity.

In fact, as the district court correctly found, when the Hirshhorn's administrator and registrar ultimately confronted Ms. Dong with questions regarding the trip, Ms. Dong immediately admitted to having taken the trip and that it had not been authorized.

In light of the entire record, the plain language and legislative history of the Privacy Act, the *OMB Guidelines*, and the D.C. Circuit's decision in *Waters*, the district court in *Dong* concluded that concern over Ms. Dong's possible reaction did not warrant a clear violation of her privacy interests. In the district court's view, the record sufficiently supported Ms. Dong's claim that the agency failed to elicit information regarding her alleged unauthorized courier trip directly from her to the greatest extent practicable. Therefore, the district court held that this prong of the Privacy Act test was satisfied.

To recover damages, however, the district court stated that the plaintiff also must show that the violation of the act by the agency was intentional or willful.

In *Dong*, the defendant admitted that top Smithsonian management had been informed of the district court's holding in the earlier *Cotton* case. As such, top Smithsonian management was on notice that the the institution was subject to FOIA.[40] The district court had already found

that there was no effort made either to educate or instruct employees about the procedures and substance of the Privacy Act and FOIA. The court concluded that there were clear indications and facts that the agency intentionally chose to ignore the law merely because of its disagreement with the district court's ruling in *Cotton*. Therefore, Judge Kessler held that the Smithsonian's decision to ignore the prior decision holding it subject to FOIA and the Privacy Act constituted "reckless disregard for the Privacy Act rights of the approximately two-thirds of the Smithsonian staff who are federal civil service employees and promotes an environment in an agency where Privacy Act violations could readily and easily occur."

In an attempt to avoid the holding ultimately reached by the court, the defendant in *Dong* responded to the plaintiff's claim that the Smithsonian had acted with reckless disregard for Ms. Dong's Privacy Act rights by arguing that the agency reasonably concluded from 1992 to 1995 that it was not covered by the Privacy Act. The defendant's position in that regard relied on its interpretation of the D.C. Circuit's appeals decision in *Cotton*. As pointed out by Judge Kessler, however, while *Cotton* on appeal was the same basic case decided by Judge Richey in his district court opinion, it was in a very different procedural posture before the D.C. Circuit. Specifically, no appeal was taken from Judge Richey's holding that the Smithsonian was covered by FOIA.

As pointed out by Judge Kessler, the appeal in *Cotton* that was filed in the D.C. Circuit related only to the appropriateness of the award of attorneys' fees granted by the district court. The Smithsonian did not appeal the holding that it was covered under FOIA. In *Cotton*, the D.C. Circuit held that the Smithsonian's position that it was not subject to FOIA *prior* to Judge Richey's original decision in *Cotton* was reasonable for purposes of avoiding an award of attorneys fees. However, in Judge Kessler's opinion, by the time of its actions in *Dong*, *i.e.*, the fall of 1993, the Smithsonian could no longer reasonably conclude that it was exempt from coverage under the Privacy Act, given that the district court's holding in *Cotton*, which specifically recognized the Smithsonian to be an agency covered under FOIA and thus the Privacy Act, was issued in 1992.

As Judge Kessler reasoned, the investigation of Ms. Dong took place long after the *Cotton* decision was issued. In short, the court found that the agency, during the events that formed the core of the *Dong* case, was on notice that Judge Richey's opinion had been issued, that the *Cotton* decision indeed applied, and that it was the only decision in existence at that point on the particular issue of the Smithsonian's coverage under FOIA and the Privacy Act.[41] It was unreasonable for the Smithsonian to totally disregard and ignore the only existing applicable case law (which it failed to appeal) simply because it thought that the case was wrongly decided. For those reasons, the district court held that "the defendant's violation of the Privacy Act was clearly willful and intentional."

Next, the district court turned to the issue of whether the Smithsonian's intentional or willful violation of section 552a(e)(2) had an adverse effect on Ms. Dong. If Ms. Dong suffered such an effect, she would be entitled to recover actual damages she sustained. Actual damages under that provision of the statute, in the district court's view, encompasses not only pecuniary losses, but also all the ordinary elements of compensatory damages, including mental depression as well as physical injury, if these elements are supported by record evidence.

The plaintiff claimed damages for emotional trauma, emotional distress, pain and suffering, and harm to her reputation, each of which was discussed by the district court. First, the district court noted that there were no claims submitted for any out-of-pocket expenses. The district court next turned to the plaintiff's claim of emotional harm. The plaintiff testified — and the court credited her testimony — that she has suffered from extensive and constant sleeplessness at night. The district court found, however, that the condition had not been severe enough to require either medical or psychiatric care. As the district court stated, "although that is certainly not a requirement of establishing emotional distress, however, it is certainly also indicia of its existence and its severity."

In addition, the district court found no evidence in the record that the emotional distress that the plaintiff did suffer was so severe that it impacted her in any other area of her life, *e.g.*, at work, where she continued to excel and be promoted. Nor did the court find that the plaintiff had been damaged with regard to any interpersonal relationships outside of work. The district court credited the evidence that the plaintiff was certainly upset over this matter, suffered sleeplessness, *etc.*, But the distress, which undoubtedly existed, was not severe enough in the court's view to warrant an award of damages.

Ms. Dong also claimed damages for harm to her reputation. The district court found that "there was definitely some adverse reaction on the part of the plaintiff's colleagues at MOMA and 'the Met' in New York, some of which adversely effected Ms. Dong's reputation." In the court's view, suspicions were created; red flags were raised in the minds of both of those museum officials. Specifically, after analyzing the deposition transcripts of each New York museum official, the court found that both officials knew that the calls from the Hirshhorn's administrator and registrar were "most unusual and unorthodox." One such New York colleague was found by the court to have indicated clearly that, in the future, if there were any kind of a problem, conflict, or suspicion about what Ms. Dong was requesting or negotiating for a loan, she would go to Ms. Dong's supervisor.

In the court's view, while there was nothing tangible in the record to show the loss of reputation or an actual impact on the plaintiff's reputation, such as lost opportunities or honors within the profession, the court recognized

that Ms. Dong's was a very small professional world. Many of the registrars know each other and it is easy for one negative phrase, hint, or intimation, even from either of the two New York museum officials about Ms. Dong's integrity, could have a ripple effect that could adversely affect her throughout that small professional community.

Therefore, the district court concluded that there was direct injury to Ms. Dong's reputation in terms of the reactions and responses of the New York museum officials as well as indirect injury in terms of the small, rather close-knit professional community in which Ms. Dong worked. Again, in the court's view, the injury was not severe, but, as Judge Kessler stated, "when we are speaking of something as important, as amorphous, as evanescent as reputation, even the slightest whisper can stain a lifetime of hard work."

Taking into account all of the facts that the district court recited — the existence of damages but the absence of any severity — the court awarded as damages in *Dong* the sum of $2,500 and, thereafter, granted the parties' stipulated attorneys fees incurred by the plaintiff, *i.e.*, $89,500 by separate order filed Oct. 1, 1996. The Smithsonian Institution has filed an appeal to the D.C. Circuit, which was still pending at press time. The saga in *Dong* continues.

Federal Wake-Up Call

Section 552a(e)(2) of the Privacy Act plays a critical role in protecting the privacy rights of federal employees. Few federal employees or, for that matter, agency management and human resources officials, are even aware of the rights and investigatory requirements that statutory section provides. Consequently, the district court's decision in *Dong* serves as an important wake-up call to federal agencies that section 552a(e)(2) of the Privacy Act must be taken seriously. Otherwise, agencies may find themselves in willful violation of constitutional and statutory privacy rights and on the losing end of a damages award, just like the Smithsonian Institution in *Dong*. ■

Joseph V. Kaplan & John P. Mahoney, co-counsel for the plaintiff in Dong v. Smithsonian Institution, *are the managing principal and senior associate, respectively, in the Washington-D.C.-based employment law firm of Passman & Kaplan, P.C.* *© 1997 Joseph V. Kaplan, Esq., John P. Mahoney, Esq., and Passman & Kaplan, P.C. All rights reserved. Reproduction in whole or in part without written permission from the authors is prohibited.*

Endnotes

[1]The Privacy Act of 1974, 5 U.S.C. § 552a.

[2]943 F. Supp. 69 (D.D.C. Oct. 31, 1996).

[3]Section 552a(e)(2) states that: "[E]ach agency that maintains a system of records shall . . . collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under federal programs. 5 U.S.C. § 552a(e)(2). In the authors' experience, few agency officials tasked with the responsibility to undertake misconduct investigations are aware of this provision.

[4]*Waters v. Thornburgh*, 888 F.2d 870, 875 (D.C. Cir. 1989).

[5]*Id.* (quoting *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act* [hereinafter "Staff Analysis"], 120 Cong. Rec. 40,405, 40,407, *reprinted in Legislative History of the Privacy Act of 1974* [hereinafter Sourcebook], 991 (1976).

[6]Section 2(a)(4), Privacy Act, 5 U.S.C. 552a note, *reprinted in* 1974 U.S.C.C.A.N at 2178.

[7]5 U.S.C. § 552a(e)(2).

[8]888 F.2d 870, 873 (D.C. Cir. 1989).

[10]*Id.* at 874 (citing *Office of Management and Budget (OMB) Privacy Act Guidelines*, 40 *Fed. Reg. 28,949, 28,961* (1975)[hereinafter "OMB Guidelines"]). The *OMB Guidelines* list several practical considerations that should be considered by agencies where they propose to collect information from a third party source. These practical considerations include: the nature of the program (where the information can only be obtained from third parties, as in criminal investigations); the costs; the risk that the information to be collected from the third party, if inaccurate, could result in an adverse determination; the need to insure the accuracy of information supplied by an individual; and, once the agency has determined that it is not practicable to obtain the information from the subject, the provisions for verifying that third-party information with the individual. *OMB Guidelines*, 40 Fed. Reg. at 28,961; *see also Waters*, 888 F.2d 874-75 n.7.

[11]5 U.S.C. § 552a(e); Dong, 878 F. Supp. at 244; *Cotton v. Adams*, 798 F. Supp. 22 (D.D.C. 1992). In fact, under the Privacy Act, a plaintiff may only file civil actions against an "agency." See 5 U.S.C. § 552a(g). It is well settled law that the term "agency" does not encompass individual government officials. *See, e.g., Connely v. Comptroller of the Currency*, 876 F.2d 1209, 1215 (5th Cir. 1989); *Bruce v. United States*, 621 F.2d 914, 916 n.2 (8th Cir 1980). As the U.S. Court of Appeals for the Sixth Circuit expressly observed, "Congress could have exposed individuals to civil liability under section 552a(g) [of the Privacy Act] but chose not to do so . . . ." *Windsor v. The Tennessean*, 719 F.2d 155, 160 (6th Cir. 1984).

[12]5 U.S.C. § 552a(g)(4).

[13]*Staff Analysis*, 120 *Cong. Rec.* at 40,406, *reprinted in* Sourcebook, at 990.

[14]*Waters*, 888 F.2d at 875 (quoting *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984)(*Albright II*)).

[15]821 F.2d 789 (D.C. Cir. 1987).

[16]*See Tijerina*, 821 F.2d at 799.

[17]*Albright II*, 732 F.2d at 189.

[18]*See* U.S.C. § 552a(g)(1)(D) *Waters*, 888 F.2d at 874-75; *Johnson v. Department of Treasury*, 700 F.2d at 977-78

(5th Cir. 1983).

[19]*See* 5 U.S.C. § 552a(g)(1)(D); *Waters*, 888 F.2d at 872.

[20]*See Johnson*, 700 F.2d at 973.

[21]*See Johnson*, 700 F.2d at 984-86 (quoting *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 834-35 (8th Cir. 1976)(noting that the legislative history of the Privacy Act includes specific references to judicial interpretations of the provision for "actual damages" under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*)).

[22]*Johnson*, 700 F.2d at 979.

[23]Sec. 2(b), Privacy Act, 5 U.S.C. § 552a note, *reprinted in* 1974 U.S.C.C.A.N. 2177, 2178 (emphasis added).

[24]In relying on legislative history to support an interpretation of "actual damages" in favor of awards for emotional distress, it should be noted that such reliance does not violate Supreme Court instruction regarding reliance on legislative history. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). Specifically, such reliance on legislative history does not create a waiver of sovereign immunity. Rather, the legislative history is utilized to explain Congress' intent in creating a waiver of sovereign immunity in the express language of the Privacy Act. The use of legislative history in this regard is specifically endorsed by both the D.C. Circuit, *Waters*, 888 F.2d at 874, and the 5th Circuit in *Johnson*, 700 F.2d at 979.

[25]5 U.S.C. §§ 552a(e)(2), (g); *Rose v. United States*, 905 F.2d 1257 (9th Cir. 1990).

[25]*See Dong v. Smithsonian Institution*, 878 F. Supp. 244 (D.D.C 1995).

[26]*Dong*, 943 F. Supp. at 71.

[27]*Id.* As Judge Kessler also stated during her bench decision, Ms. Dong "took annual leave for [the days during which she was on the courier trip in question], even though she was entitled to take this trip on regular work time." *Dong*, C.A. No. 94-628 GK, slip op. Tr. at 3 (D.D.C. Sep. 5, 1996) (Transcript of the Bench Ruling Before the Honorable Gladys Kessler, U.S. District Court Judge). After its issuance, Judge Kessler decided to publish that bench decision in the *Federal Supplement*. *See Dong*, 943 F. Supp 69 (D.D. C. 1996).

[28]Dong, 943 F. Supp. at 71.

[29]*Id.* at 72. The FOIA and the Privacy Act share the same definition of federal agency. *See* 5 U.S.C. §§ 552(f), 552a(a)(1); *see also id.* § 551(1).

[30]798 F. Supp. 22 (D.D.C. 1992)(holding that the Smithsonian is an agency subject to FOIA.

[31]*Dong*, 943 F. Supp. at 72 (citing *Cotton*, 798 F. Supp. at 22).

[32]*Dong*, 943 F. Supp. at 72 (citing *Dong*, 878 F. Supp. at 244).

[33]*Id.* (quoting *Waters*, 888 F.2d at 874 (citing *OMB Guidelines*, 40 *Fed. Reg.* 28,949, 28,961)).

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 23, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find attached responses to questions arising from the December 5, 2006, appearance before the Committee of Associate Deputy Attorney General Ronald J. Tenpas at a hearing entitled "Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity." We hope that this information is helpful to the Committee.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

"Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity"
Senate Judiciary Committee
December 5, 2006

Questions for Associate Deputy Attorney General Ronald J. Tenpas

Questions posed by Senator Specter

1. **Congress enacted 18 U.S.C. sec. 1348 in 2002, after that amendment was reported out of the Judiciary Committee. How many indictments have there been under that statute? How many of those involve unlawful insider trading?**

The cases that have been charged under 18 U.S.C. Section 1348 were identified in an attachment to a Question for the Record Response that the Department of Justice submitted to the Senate Judiciary Committee on December 14, 2006, as a follow-up to the Committee's hearing on September 26, 2006. For ease of reference, a copy of that attachment is included again herewith. Of all those charged under Section 1348, sixteen cases involved allegations that a defendant engaged in insider trading.

2. Did the Department of Justice suggest a term of 3 years probation in connection with the 11/30/06 sentencing of hedge fund manager, Michael Tom, for trading on a tip that Citizens Bank would be acquiring Charter One Financial?

The United States did not suggest a probationary term for Michael Tom. Rather, the United States strongly opposed a probationary term and, instead, argued in favor of a term of imprisonment of thirty-seven months in light of Mr. Tom's conduct. That conduct included, by Mr. Tom's own admission in his plea agreement, that he attempted to obstruct the investigation. The facts revealed that he created back-dated and fraudulent documents related to Ms. Wang's (a co-conspirator) investment in Mr. Tom's fund in order to hide his ties to Ms. Wang, provided this fraudulent document to the SEC, attempted to improperly coordinate witness testimony, and testified falsely before the SEC in accordance with that plan. The government's suggested sentence was at the low end of the relevant sentencing guideline range determined by the Court to apply and which the parties agreed applied. Despite its guideline determination, the Court chose to impose a sentence of three years probation, the first six of which are to be served while the defendant is in a community confinement center.

In announcing its decision to impose only a probationary sentence on Mr. Tom, the Court relied, among other things, on the fact that Ms. Wang -- a defendant who cooperated, was less culpable, and enjoyed a far smaller financial benefit -- had received a probationary sentence and that Mr. Tom was likely to be fined by the SEC in its parallel civil proceeding. The United States disputed these factors as sufficient justifications for the probationary sentence. It is only the new-found discretion

afforded courts by the Supreme Court's Booker decision that made such a sentence possible and the case presents a powerful example of why a return to a mandatory sentencing guideline system is necessary.

3. Are bounty programs effective tools in detecting and prosecuting tax fraud and False Claims Act fraud? You mention concern about bounties in a criminal context, but tax fraud and government fraud often involve criminal penalties. Please explain whether your concern about bounties for unlawful insider trading prosecutions would be different than what it would be in the context of tax or government fraud.

Bounty programs can, in certain circumstances, be effective tools. The question notes two areas where financial incentives to report misconduct have resulted in private citizens reporting misconduct, which in turn has led to effective government enforcement actions. Both the tax and False Claims Act contexts differ from insider trading, however, in that tax violations and false claims to the government are often apparent to individuals who have not participated in the actual violation. For example, a low level company official may be aware of company billing practices that result in false claims being submitted to the government, even when that individual is not personally responsible for preparing or submitting those billings. Insider trading, however, tends to be conducted among a secretive and small group, who closely guard their activities. Thus, as to insider trading, the most likely sources of "tip" information are those who were directly engaged in the wrong-doing. The SEC's experience to date with offering rewards to those who report insider trading is instructive. As the SEC explained in its testimony, its program has produced very limited results, which is unsurprising given the nature of insider trading.

Because false claims and tax "bounty" programs do produce effective results in certain situations, it is worth suffering some of the ancillary consequences such programs may have for parallel criminal investigations, most notably, that witnesses involved in the criminal case can be impeached with the fact that the possibility of a "bounty" gives the witness an incentive to lie or shade the facts. As to insider trading, however, because there is not likely to be a large number of cases produced through offering a bounty, we doubt that it is worthwhile to create such a statutory scheme, with its related complications for witness impeachment. Even if not used, the existence of such a statutory scheme would potentially subject witnesses to impeachment on this issue, as we expect in trial such a statutory change would likely open the door to defense counsel questions about a witness's financial incentives, even if that witness did not appear to be a "tipster" qualifying for a bounty.

You mention concern that eliminating the "duty" requirement may subject to criminal sanctions "those who innocently come by valuable information and trade on it." Could the requirement of proof of scienter and willfulness address that concern? Even if "innocently" obtained, if someone is given information

that is material and non-public, is it preferable to have clarity as to whether the person may trade on that information?

Such a *scienter* requirement would help to narrow the risk that those who innocently come by information and trade on it would be criminally prosecuted, but may not be sufficient to fully address the consequences of eliminating the "duty" element. Clarity in legal regimes is always desirable. The current "duty" requirement helps to provide such clarity because it gives a person who trades on information a greater level of confidence that that they can legally do so – a trader can be confident that so long as he or she does not enjoy a fiduciary relationship to the information (either directly or inherited through a third party who provided the information), such information may safely form the basis for trading. So, for example, the duty requirement may reassure a member of the public that he or she can safely trade when the person simply overhears information in an elevator or on the street or receives information from a friend whose information source is unclear, or if the trader otherwise conducts legitimate research that may involve contact with those who have a relationship with the company. Such a trader, whether an individual or institutional investor, may lack the confidence to trade if the only defense available is that the trading was not "knowingly" reliant on insider information. In sum, the more limited the legal requirements are for proving insider trading, the more likely it is that investors will be chilled from trading for fear that they will later be subject to prosecution. Discouraging legitimate trading is a cost that must be born in mind when considering any change to the current legal requirements.

CRIMINAL CASELOAD STATISTICS
DETAIL RECORDS OF TITLE 18 USC 1348
ALL CHARGES AND NO APPEALS

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TXN					18 :01956	060919	GT	PLED	061025	
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TXN	Price, Patrick	DC	LH	050720	18 :00371	060717	DM	GWOD	061108	
TXN					18 :00371	060717	DM	GWOD	061108	
TXN					18 :01343	060717	DM	GWOD	061108	
TXN					18 :01348	060717	GT	PLED	061108	36Probation
TXN	Saporta, Nancy	DC	LH	050720	18 :00371	060717	GT	PLED	061108	42Probation

TXN					18 :00371	060717	DM	GWOD		
TXN					18 :01343	060717	GT	PLED		
TXN					18 :01346	060717	GT	PLED		
UT	Weeks, Kenneth L.	DC	GCD	050415	18 :01348	051115	GT	PLED	60831	7
UT					18 :01348	051115	DM	GWOD		

* Caseload data extracted from the United States Attorneys' Case Management System
**Kenneth Weeks is listed twice as a defendant but counted only once. Mr. Weeks, a defendant in the Eastern District of New York, was transferred to the District of Utah

Disposition Codes:
DM: dismissed without prejudice
GT: guilty
NG: not guilty
TR: Transfer from district (Rule 20, 21)

Disposition Reason:
DEMD: by defense motion (district court)
GWDD: by government from district court with DOJ authorization
GWOD: by government from district court with no DOJ authorization
JTRD: jury trial verdict (district court)
PLED: Plea (district court)
RTWD: Rule 20 (district court)

7

Judiciary Committee Hearing: Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?
Questions for the Hearing Record
Questions from Senator Grassley:

For Ms. Linda Thomsen
Director, Enforcement Division
U.S Securities and Exchange Commission

Introductory Statement

Thank you for the opportunity to respond to questions concerning the Division of Enforcement's decision to terminate the employment of probationary employee Gary Aguirre. Before answering your specific inquiries, I would like to put in context the favorable evaluation Mr. Aguirre received and his subsequent termination.

In considering Aguirre's formal evaluation for merit pay purposes, it is important to bear in mind that he was, first and foremost, a probationary employee throughout the relevant period. As a probationary employee, Aguirre was not yet entitled to have his performance evaluated solely in accordance with the formal evaluation processes applicable to permanent employees. Until he completed his probationary period, Aguirre could be terminated at any time, for any lawful reason, regardless of the formal evaluation process. During the first year of SEC service, an employee's probationary status trumps the evaluation procedures that would otherwise apply to him as a permanent employee.

Aguirre's employment with the SEC was terminated on September 1, 2005, at the end of his probationary period. The end of the probationary period is a fixed calendar date marking the end of the first year of service. It cannot be extended or changed and is independent of any other evaluative or work process the employee may be engaged in. By happenstance, Aguirre's termination at the end of his probationary period came within a month of a merit pay evaluation awarding him a 2-step pay increase. However, the merit pay evaluation was actually for the period ending April 30, 2005, and Aguirre's performance deteriorated between May and August.

In any event, Aguirre's overall performance through even April 30, 2005, did not warrant a 2-step merit pay increase and it should not have been awarded to him. That pay increase resulted from a combination of lapses in communication when Aguirre transferred between branches, a desire on the part of the agency and Aguirre's supervisors to give him a "fresh start" in his new branch, and certain aspects of the applicable SEC merit pay system, which have since been revised.

Aguirre's original Branch Chief, Charles Cain, believed that his overall performance was poor. By the end of Aguirre's tenure in Cain's branch on January 17,

2005, Cain thought Aguirre should be fired immediately rather than transferred. However, part of the SEC's impetus for granting Aguirre's request to transfer was to give him a "fresh start." For that reason, Aguirre's new branch chief, Robert Hanson, did not consult Cain about Aguirre's prior performance. Hanson based his merit pay evaluation solely on the period of about three months Aguirre had been in his new branch before the end of the rating period on April 30th. The SEC has never questioned Aguirre's basic competence as an attorney or his commitment and work ethic as demonstrated in the Pequot investigation, and those factors were considered by Hanson in awarding him a merit pay increase.

In April 2005, the SEC's merit pay system had been in place for little more than a year and was still a work-in-progress. At that time, the merit pay system involved an initial pass/fail evaluation on four basic elements of performance. However, in the initial pass/fail review, the standard of acceptable performance was set at an extremely low level. Nearly every SEC employee was rated acceptable on all four elements. A probationary employee's failure to meet the exceedingly low standard of "acceptable" on any one of the four elements would almost surely have resulted in immediate termination.

After the pass/fail review, a second level of review was conducted for purposes of setting merit pay. The review was initiated by the employee, who drafted a statement regarding his or her contributions to the agency during the rating period. The employee's supervisor then reviewed the employee's assessment, and submitted his or her own statement indicating agreement or disagreement with the employee's statement. Significantly, in 2005, the merit pay system considered only positive contributions; areas of poor performance or the need for improvement could not be considered in setting merit pay, though they could be considered for other purposes. Further, the results of the merit pay evaluation for the period ending April 30, 2005 were not collated and approved by the Division of Enforcement's Review Committee until July 18, 2005. The results were communicated to Human Resources and supervisors on August 1 and to employees later in August. Thus, there was a substantial time lag between the conduct reflected in the evaluation and the date the resulting pay increases became effective. Numerous elements of the merit pay system, including the extent of the time lag and the consideration of only positive contributions, have since been revised and improved upon by the SEC's Office of Human Resources.

On August 1, 2005, Associate Director Paul Berger discussed with Hanson the favorable evaluation that Hanson and Assistant Director Mark Kreitman had given of Aguirre's performance. Hanson and Kreitman had previously expressed to Berger concerns about Aguirre's conduct. Berger asked whether the rating Hanson had given Aguirre was appropriate. Hanson stated he did not believe in retrospect that the rating was appropriate. Berger asked Hanson to consider whether Aguirre's evaluation should be supplemented to include some of the concerns about Aguirre's behavior. After meeting with Berger, Hanson met with Kreitman and they agreed that a supplement to the evaluation was appropriate. Kreitman drafted a supplemental evaluation, solicited Hanson's comments, and forwarded the final Supplemental Evaluation to Berger that same day. The Supplemental Evaluation stated:

> "Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods."

After citing an instance in which Aguirre drafted subpoenas that had to be revised to avoid violation of privacy laws, the Supplemental Evaluation went on to state:

> "His manner has, on more than a few occasions, drawn complaints from opposing counsel which . . . raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation has uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success."

All of Kreitman's observations had been amply demonstrated by Aguirre's conduct during the course of his employment.

When Kreitman forwarded the Supplemental Evaluation to Berger, he assumed that Berger would then forward it to the Compensation Committee if he concurred in it. Berger reviewed the Supplemental Evaluation and concurred in it, but he believed that Kreitman would forward it to the Compensation Committee for further consideration and inclusion in Aguirre's personnel file. After Aguirre's termination and his subsequent request for his personnel file, it became clear that the Supplemental Evaluation had not been considered by the Compensation Committee or included in the personnel file as Berger intended. After these facts came to my attention, I concurred in the determination that the Supplemental Evaluation should be included in Aguirre's personnel file if the SEC's Office of Human Resources approved of that action and I further directed that any dates relating to the document be accurately recorded.

Shortly after the Supplemental Evaluation, Aguirre left on vacation in mid-August 2005. By then he had tendered, and subsequently revoked, his written resignation. Aguirre also informed his supervisors that while he intended to finish the Pequot investigation, he had no intention of drafting the customary action memo laying out the facts and specific evidence that had been discovered. Drafting this memorandum is often the most difficult and time-consuming aspect of an investigation. Given his key role in the investigation, assigning the task to anyone other than Aguirre would be duplicative, inefficient and unduly burdensome to other staff.

Aguirre's refusal to complete his primary case responsibility by drafting the action memo was also a breach of agency procedure. Staff attorneys with primary responsibility for an investigation always have primary responsibility for completing the action memo; they do not have the option of declining that duty. Aguirre's refusal to

complete his duties demonstrated, once again, Aguirre's inability to work with (and indifference to) other staff and disregard for SEC procedures.

After being notified in late August that Aguirre's probationary period would soon end, Berger spoke with Kreitman and Hanson about whether to retain Aguirre. Based on the many concerns they had developed about Aguirre's conduct, which were described at the recent hearing and in their written statements, Kreitman and Hanson recommended that Aguirre be terminated from his employment position. Berger agreed with that recommendation, and Berger, Kreitman, and Hanson subsequently met with me to discuss it. I made the final decision.

By letter dated September 1, 2005, which I signed, Aguirre was informed that his employment was terminated during his trial period "based upon your demonstrated inability to work effectively with other staff members and his unwillingness to operate within the Securities and Exchange Commission (SEC) process." The letter further stated that the termination would be effective at the close of business on Friday, September 2, 2005. Aguirre was also given the reasons for his termination, which had already been brought to his attention by his supervisors. Among other things the letter stated,

> "Several times throughout your trial period, your supervisors advised you that your conduct was inappropriate. You were permitted to transfer from one Assistant Director Group to another after assuring your Associate Director that problems that had occurred, including personality conflicts and resistance to standard supervision, would not recur. However, you have continued to have conflicts with other staff attorneys, your branch chief and a Trial Attorney assigned to your primary case responsibility. You have continually expressed dissatisfaction with the supervisory structure and ignored the Chain of Command in the Division."

With respect to the Pequot investigation, the letter stated that Aguirre "indicated that you were uninterested in participating in the preparation of your primary case responsibility beyond the investigative stage. While your work substantive work generally has been good, the problems that have occurred in other areas are so significant that they far outweigh the value of that work." The letter notes that all three of Aguirre's SEC supervisors had met with him repeatedly "to explain to you the importance of working together with other staff members to achieve consensual goals and the importance of operating within the SEC process." For the reasons previously set forth and because Aguirre's conduct had not improved to a level that would warrant retaining him beyond his probationary period, the SEC exercised its right to terminate his employment before the probationary period expired.

(1) According to documents produced by the SEC, the Merit pay schedule for 2005 consisted of the following seminal dates:

July 18, 2005 – Compensation Committee review beginning at 9:00

July 19, 2005 – Linda Thomsen receives Compensation Committee recommendations

July 27, 2005 – Linda Thomsen, the Deciding Official, finishes merit pay process for Division of Enforcement

August 1, 2005 – Division of Enforcement transmits final results to Office of Human Resources

(a) Did you receive the merit pay schedule increases on July 19, 2005?

Yes.

(b) Did you finish reviewing them as noted on July 27, 2005?

Yes.

(c) Based upon this schedule, all decisions by the Compensation Committee were due to the Office of Human Resources on August 1, 2005. Were you aware of any changes to the schedule as approved by the Compensation Committee and you after July 27, 2005?

No.

(d) Were any proposed alterations, amendments, or changes circulated for review after the July 27 but not accepted by either the Compensation Committee or yourself? If so, please provide a detailed explanation outline dates, times, and parties involved.

No. As noted above, a Supplemental Evaluation of Mr. Aguirre's performance was drafted after July 27. The Supplemental Evaluation was intended to be inserted into Mr. Aguirre's personnel file and circulated to the Compensation Committee in connection with the Committee's merit pay decisions, but it was not placed in the personnel file or circulated to the Committee when drafted because of a logistical misunderstanding. When I became aware of the Supplemental Evaluation and the logistical error, I concurred in the determination that the Supplemental Evaluation should be included in Mr. Aguirre's personnel file so long as the Office of Human Resources also concurred in that determination, and I further directed that all dates regarding the document and its inclusion in the file be recorded accurately.

(e) In your capacity as director of the Enforcement Division, how many supplemental re-evaluations of staff have you seen once they were approved for a merit pay increase?

Since I became Director of the Division of Enforcement in May 2005, I have seen two formal supplemental re-evaluations of employees.

(2) Much discussion in this matter has surrounded Mr. Aguirre's issuance of subpoenas without his supervisor's approval. In fact, during your testimony you stated that Mr. Aguirre issued, "without his supervisors review or approval, subpoenas that violated federal privacy law, which were withdrawn after his supervisors learned of them. But for the supervisors' corrective actions, the former employee's work product could have been extremely damaging to the SEC."

(a) Does the SEC have any written policies that surround the chain of command for the issuance of a subpoena?
Yes.

i. Is this information provided to Attorney's when they are hired?
Yes.

ii. How is this information presented (e.g. orally or in writing)?
Generally, the information is presently both orally and in writing.

iii. Please provide any written policy that exists at SEC for issuing subpoenas, or any training materials (e.g. a SEC manual comparable to the U.S. Attorney's manual).

New SEC staff attorneys are provided with both oral and written guidelines and other training regarding the issuance of subpoenas in connection with an investigation. The SEC's staff structure is hierarchical and features multiple layers of supervision. In the first few days on the job, a new staff attorney will be introduced to two or three levels of supervisors, including their Branch Chief, their Assistant Director, and their Associate Director. New attorneys are often trained by their Branch Chief or other more senior staff attorneys regarding the SEC chain of command and other appropriate protocols in the conduct of an investigation. This hands-on training generally takes place in the context of the new staff attorneys' first few investigations, with the Branch Chief or other superior leading the new hire through all required tasks in the course of an investigation, and reviewing any written work product created by the new hire. A new hire is trained to expect that his or her written work product will be reviewed by one or more supervisors or senior SEC staff attorneys. It is generally considered inappropriate for staff attorneys to send out written work product that has not been reviewed by at least one supervisor or a more senior team member.

In addition to on the job training by more senior attorneys, new hires are also provided with extensive written guidelines and other training materials. New hires are given an Enforcement Orientation Manual and an Enforcement Training Program Manual. These materials are provided in connection with an annual multi-day Enforcement Training/Orientation Program. New staff attorneys are also granted access to the Enforcenet database, which contains, among other things, extensive information on

the proper conduct of investigations; a privacy manual and other specific information to ensure compliance with federal privacy laws; a guide to "red-flag" issues including privacy and privileges; ethics guidance; and guidelines for subpoenas. With respect to subpoenas, the guidelines include a standard subpoena cover letter, guidelines on special subpoenas to telephone and internet companies; business record certifications, and materials regarding special considerations in the issuance of subpoenas, such as compliance with applicable privacy statutes, subpoenas for immediate production of documents, issuance of subpoenas in relation to pending litigation and issuance of subpoenas to members of the news media.

(b) Was Mr. Hanson informed by Mr. Aguirre that he intended to issue the subpoenas in question? If so, please describe.

Yes. Aguirre notified Hanson he wanted to send out these and other subpoenas.

(c) Did Mr. Hanson ever respond to Mr. Aguirre with concerns regarding the subpoenas?

Yes. Hanson believed the subpoenas could be improper. He directed that Aguirre speak with the Internet Enforcement unit of the Division of Enforcement, which had experience in this area, concerning the subpoenas.

(d) Which supervisors of Mr. Aguirre took the "corrective actions"?

Hanson.

(e) What "corrective actions" were taken?

When Hanson subsequently learned Aguirre had issued the subpoenas, he told Aguirre he should not have done that and the problem must be resolved. Later, Aguirre told Hanson he had withdrawn the subpoenas. Aguirre was casual and smiling about this matter, which Hanson considered serious.

(f) Is there any documentary evidence that describes or relates to the aforementioned "corrective actions"? If so, please provide all documents. In the event this production includes documents not previously produced, provide a narrative explanation as to why it was not previously produced.

We have not located among the files Aguirre left upon termination any confirmation of his withdrawal of the subpoenas.

(3) Has the SEC filed an insider trading case during the last five years when the statute of limitations period as specified in Section 20A(b)(4) of the Securities Exchange Act of 1934 has expired? If so, please specify the name of the case, court where filed, and case number. Additionally, please list any other agreements, settlements, and/or other adjudications that may have occurred following the

expiration of the statute of limitations. In complying with this request please respond in detail and list each enumerated response separately.

The SEC has the authority to file actions after the expiration of the limitations period specified in Section 20A(b)(4) of the Securities Exchange Act of 1934, and has done so in some instances, though I am unaware of any such cases involving insider trading during the last five years. In such cases, despite the expiration of the statute of limitations, the SEC is authorized to obtain injunctions, cease-and-desist orders and restitution, but not penalties or industry bars. There have also been numerous instances in which the Commission has entered into tolling agreements with potential respondents to avoid the expiration of the statute of limitations and there have been numerous instances in which matters subject to such agreements have been settled or otherwise resolved after the statute of limitations would have expired in the absence of such an agreement.

(4) What facts did the SEC learn following September 2, 2005 that led the SEC to believe that John Mack had gone "over the wall", in accordance with the perquisite required by Mr. Kreitman, that led the SEC to take the testimony of John Mack?

The question assumes that the SEC believed John Mack had gone "over the wall" and that Mr. Kreitman's request for such evidence was dispositive in the Division of Enforcement's decision regarding whether to take Mack's testimony. Neither assumption is accurate. Before any final decision could be made about taking Mack's testimony in the ordinary course of the Pequot investigation after Aguirre's termination, the New York Times published Aguirre's allegations that the SEC blocked him from taking Mack's testimony because of his political connections. Aguirre styled himself as a whistleblower and claimed he was fired because of his insistence on taking Mack's testimony. Aguirre's allegations generated media interest, the commencement of the present inquiry by this Committee, and an initial round of public hearings in which only Aguirre's side of the story was told. Contrary to custom, the Division of Enforcement had become embroiled in, and indeed was the subject of, a public controversy. Under these circumstances, the SEC had little choice but to take Mack's testimony in order to dispel Aguirre's false allegations about Mack and to quell the public controversy.

To make a final decision on taking Mack's testimony, Aguirre's three supervisors—Berger, Kreitman and Hanson—met with my two Deputy Directors, Walter Ricciardi and Peter Bresnan. Since I signed Aguirre's termination letter, I did not participate in the meeting. Because Mack was a public figure and the SEC is a public agency, my Deputies decided that Mack's testimony should be taken in the interests of allowing Mack to clear himself, to dispel Aguirre's false allegations and to avoid any appearance, however false or unwarranted, that information was allegedly withheld or testimony was allegedly blocked by the agency based on Mack's political connections. If the agency did not take Mack's testimony, it would always be subject to the unfounded public accusation that it had not done so because of Mack's political connections. There would also be no testimonial record of the fact that Mack did not know about the GE/HF deal before it was publicly announced. Because of the public controversy and the public interest in truth

and full disclosure, my Deputies decided that taking Mack's testimony would serve the best interests of the Division of Enforcement and the investing public.

Once the decision to take Mack's testimony had been made, the Pequot team first completed their review of the relevant documents and then took the testimony of other witnesses from CSFB. After completion of these preparatory steps, Mack's testimony was taken for approximately four hours on September 1, 2005. The examination of Mr. Mack was thorough and comprehensive. We understand that the transcript of his testimony has been made available to the Committee. When asked, in several different ways, whether he had knowledge of the GE/HF deal before it was publicly announced, Mr. Mack consistently denied any knowledge of the deal and we are unaware of any other evidence that would suggest anything to the contrary.

1. The Department of Justice suggests that it could be helpful to put "inside trading offenses" on a firmer statutory footing than they now stand. Assuming no necessity of deferring to case law as it has developed over the past sixty years, but instead building on definitions the SEC has promulgated through its regulatory process, what articulation of the elements of the crime or offense of unlawful insider trading, or misappropriation or misuse of material non-public information would best produce more certainty for prosecutors and others for whom clarity in this area is important?

As you note, the current prohibitions against insider trading have been developed largely through SEC and judicial opinions construing the antifraud provisions of the federal securities laws. It is certainly appropriate to consider whether the current approach has generated a lack of clarity and certainty about the scope of insider trading law. In my view, however, the application of current law to the vast majority of insider trading cases is clear-cut. It is only in a relatively few unusual situations that there are serious questions about how insider trading law applies, and even in those situations the questions often arise because the legal issues are inherently fact-specific.

If we were to construct a new statutory definition of insider trading, it might be possible to address some of the uncertainties and anomalies in existing law, but I am far from certain that even the best drafting effort could put all the difficult issues to rest. Some of the key elements in any insider trading prohibition – for example, when is information "material" so as to trigger insider trading liability? What level of intent or knowledge is required in a case against a trader, a "tipper," or a "tippee"? – will continue to present potentially difficult and fact-dependent questions, as to which a statutory definition would not necessarily provide greater certainty. While the current Commission has not considered the need for a new statutory definition of the offense of insider trading, I should note that this issue was the subject of much debate roughly twenty years ago. At that time, the relevant Congressional committees, the SEC, and prominent securities law practitioners devoted extensive efforts to trying to craft an appropriate legislative definition of insider trading. Ultimately, however, because of a lack of consensus about certain elements of the definition, Congress did not go forward with a legislative definition of insider trading, but instead adopted the Insider Trading and Securities Fraud Enforcement Act of 1988, which included remedial and procedural provisions to strengthen insider trading enforcement.

SUBMISSIONS FOR THE RECORD

Testimony of

Gary J. Aguirre, Esq.

Before the

U.S. Senate Committee on the Judiciary

December 5, 2006

Mr. Chairman, Senator Leahy, and Members of the Committee:

Thank you for inviting me to testify today regarding my allegations that senior SEC officials abused their authority in supervising the insider trading investigation of Pequot Capital Management (PCM).

The Favor

My testimony today will focus on a favor. Senior SEC officials gave it. Morgan Stanley and its CEO, John Mack (Mack), accepted it.

The favor was an invisible shield. It was put in place by senior officials within the SEC's Division of Enforcement. It shielded Mack from an SEC subpoena seeking his testimony and records in the PCM insider trading investigation. That evidence was a critical step in proving whether Mack had tipped PCM's CEO, Arthur Samberg (Samberg), of General Electric's (GE) pending acquisition of Heller Financial (Heller). Mack was the only suspect. Blocking the investigation of the only suspect blocked the SEC's investigation of PCM's trading in GE-Heller. Without that investigation, the SEC would never be able to even consider the filing of insider trading charges arising out of PCM's trading in GE and Heller against Mack, Samberg, PCM or anyone else.

The favor had positive effects for some. It cleared the way for Mack's return on June 30, 2005, as Morgan Stanley's CEO. Without the favor, Mack would have faced the risk of an SEC lawsuit for insider trading over the next year. Without the favor, Morgan Stanley had two options: (1) it could pass on Mack as its new CEO and look for other candidates or (2) it could hire Mack and take the risk of an SEC insider trading case against him. According to Morgan Stanley's head of compliance, the risk of an insider trading case against Mack was one Morgan Stanley did not want to accept. The favor made that risk go away.

The timing of the favor was perfect. The search for the source of the GE-Heller tip began in May and began to point to Mack by mid-June. My supervisors authorized me to seek a criminal investigation of Mack and Samberg on June 14. An SEC subpoena for Mack's testimony and records was the next logical step in the investigation. That should have occurred during the week of June 20. But just then the shield appeared out of nowhere: one of my supervisors blocked the subpoena. Simultaneously, a Wall Street Journal article carried the headline, "Morgan Stanley May Reconsider Mack for CEO."[1]

[1] Ann Davis, *Morgan Stanley May Reconsider Mack for CEO*, WALL ST. J., June 23, 2005, at C1.

So, why would senior SEC officials give such a favor? My immediate supervisor, Branch Chief Robert Hanson, gave me the answer when he first blocked the Mack subpoena: Mack had powerful political connections.[2] He made similar statements on other occasions. I questioned this decision up the chain of command, but only got back silence at first. Mack's political influence is of course indisputable fact.[3]

If Justice at the SEC has lost her blindfold, the capital markets are in trouble. The SEC regulates the securities markets. Its success "is a bulwark against possible abuses and injustice which, if left unchecked, might jeopardize the strength of our economic institutions."[4] Few principles are more deeply engrained in Title 17 of the Code of Federal Regulations, which regulates the SEC's operation, than the mandates obligating the SEC to handle all of its affairs, including the enforcement of the securities laws, with impartiality.[5] No conduct would stray farther from those mandates than a double set of laws: one for the politically well connected and another for everyone else.

After my September 2, 2005, letter informed Chairman Cox of the favor, he directed his Inspector General (IG) to conduct an "investigation" of my allegations. The IG employed a unique investigatory method; his staff interviewed and took evidence from only those senior SEC officials who were the subject of my charges. The IG staff never contacted me. Not surprisingly, those charged with misconduct offered little

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[2] See *infra* pp. 25-34.

[3] Mack is a "Bush" Ranger, meaning he raised at least $200,000 for the President during the 2004 presidential campaign. See: John Helyar, *A Record Year for Bigtime Donors*, FORTUNE, April 19, 2004, at 46. But his fundraising went far beyond that level; he "reached elite status as a fund-raiser for President Bush" during the 2004 Presidential campaign. See: Landon Thomas Jr., *Credit Suisse Parts Ways with a Chief*, N.Y. TIMES, June 24, 2004, at C1. For example, "When Mr. Bush began raising money [in 2003], one of his first stops was New York, where he collected $4 million at an event organized in part by Mr. Paulson and Mr. Mack." See: Glen Justice, Patrick McGeehan and Landon Thomas Jr., *Once at Arm's Length from Bush, Wall Street Is Now Biggest Donor*, N.Y. TIMES, Oct. 23, 2003, at A1. Mack is also currently the CEO of Morgan Stanley, the largest contributor to the Bush 2004 Campaign. See: Rick Westhead, *What U.S. Vote Means to Investors, Incumbents Often Have an Advantage*, TORONTO STAR, Oct. 28, 2004, at L1 ("Morgan Stanley was tops through August with $527,030 (U.S.) worth of contributions to the Bush campaign.") According to Time Magazine's December 19, 2005, edition, Mack and one other candidate were "at the top of the list to replace Treasury Secretary John Snow." See: Karen Tumulty and Mike Allen, *His Search for a New Groove*, TIME, Dec. 19, 2005, at 38.

[4] 17 CFR 200.53.

[5] 17 CFR 200.55 ("In the exercise of their judicial functions, members shall ...impartially determine the rights of all persons under the law."); 17 CFR 200.58: ("A member should not be swayed by partisan demands...."); 17 CFR 200.61: ("A member should not, by his conduct, permit the impression to prevail that any person can improperly influence him, that any person unduly enjoys his favor or that he is affected in any way by the rank, position, prestige, or affluence of any person."); 17 CFR 200.64: ("Members [should] pursue and prosecute ... fairly and impartially...all matters which they or others take to the courts for judicial review."); 17 CFR 200.67 ("[T]he necessary rules should be adopted ...without fear or favor."); 17 CFR 200.69: ("Members should be ...impartial when hearing the arguments of parties or their counsel. ... The Commission should continuously assure that its staff follows the same principles in their relationships with parties and counsel."); and 17 CFR 200.735-2(a): ("In view of the effect which Commission action frequently has on the general public, it is important that members [and] employees ...maintain unusually high standards of ...impartiality..."). The regulations cited above are applicable to both the Commissioners and the Staff (17 CFR 200.735-2(b); 17 CFR 200.50; 17 CFR 200.51).

evidence against themselves. The IG was therefore duty bound to find them blameless. This kind of an investigation has a name; it is called a "whitewash."

After your Committee and the Finance Committee began their own inquiry, the SEC came up with Plan B. It directed its IG to conduct a new "investigation" and its Enforcement Division to take Mack's testimony. The same IG who did the first whitewash would do the new one. The same senior officials who blocked Mack's testimony fourteen months earlier would take his testimony.

Both aspects of Plan B lack the same element as the original decision to block Mack's testimony: *integrity.* How hard would the IG look for evidence that Mack got a favor, when that same evidence would prove his first investigation was a whitewash? How hard would senior SEC officials search for clues that Mack tipped Samberg when those same clues would prove their misconduct fourteen months earlier? The outcome of the "reopened" IG investigation and the Mack testimony were scripted and choreographed before they began. When the IG finds Enforcement gave no favor to Mack, he will also validate his first investigation. When senior Enforcement officials "cleared" Mack last October, they effectively did the same for themselves.

Still, by taking Mack's testimony, the SEC conceded the necessity of this step. The SEC claims it was just following "established procedures" when it recently reversed its June 2005 decision and then took Mack's testimony.[6] Would not those same "established procedures" call for Mack's testimony to be taken in June 2005 when it was originally sought by the staff person heading the investigation? Or did some new evidence recently surface? If so, what was that evidence? How was it overlooked before? Further, as discussed below, why would the SEC wait until two critical statutes of limitations had expired before taking Mack's testimony?

The SEC Favor to Mack Was No Favor to the Nation's Capital Markets

When senior SEC officials blocked the Mack subpoena, they derailed an investigation of suspected insider trading involving one of the world's largest investment banks and, at that time, the world's largest hedge fund.[7] That focus on investment banks and hedge funds touched on a type of insider trading with global dimensions. In June 2005, the Federal Services Authority ("FSA"), the United Kingdom's counterpart to the SEC, recognized an "institutionalized" form of insider trading involving investment banks and hedge funds.[8] The FSA suspected that investment banks were giving illegal tips of pending mergers and acquisitions to their best hedge fund customers in return for

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[6] Siobhan Hughes, *SEC's Cox Seen Letting Stand Court Hedge-Fund Ruling*, DOW JONES NEWS SERVICE, July 24, 2006.

[7] Danny Hakim, *Hedge Fund Falls Victim to Tech Bear*, N.Y. TIMES, May 24, 2001, at C1. ("The world's largest hedge fund group, Pequot Capital of Westport, Conn., is believed to have about $15 billion in assets ...")

[8] Richard Fletcher, *Targeted: The Hedge Fund Insider Dealers*, SUNDAY TIMES (London) June 19, 2005, at Business 11.

lucrative hedge fund business.[9] More recently, the FSA, has "uncovered signs of insider dealing at almost a third of British M&A deals, with possible culprits including traders at hedge funds and investment banks."[10]

The same patterns have emerged in the US. Evidence taken by your Committee in September indicated possible insider trading in advance of forty-one percent of the US mergers and acquisitions over a billion dollars in size during a recent one year period.[11]

So how is the SEC doing in catching and civilly prosecuting hedge funds who engage in insider trading? How many cases has the SEC filed against hedge funds for insider trading? What are the tangible results of those cases? That information is not readily available. It is true that the SEC frequently issues statistics to bolster its image as the cop on the street, strolling along with a vigilant eye on both hedge funds and insider trading. According to its statistics, the SEC has brought more than 300 insider trading cases over the past five years[12] and some 90 cases against hedge funds since 1999.[13] Yet, these two statistics conceal a disturbing fact: the SEC's actual record of enforcing insider trading laws against hedge funds.

What is that record? Aside from the PIPE cases,[14] the SEC has recovered approximately $110,000 from hedge funds and their principals *for all other types of insider trading*. This includes trading on illegal tips before public announcements of any of the following events: mergers, acquisitions, negative and positive earnings surprises, government investigations (e.g., FDA approval or withdrawal of approval), CEO hirings or firings, or anything else that could affect the value of a public company. How could this be? The explanation is quite simple: the SEC has brought a total of six cases for insider trading against hedge funds.

Three of those cases[15] involve a cookie cutter type of insider trading: the violator shorts a public company in advance of an announcement of a Private Investment in Public Entities (PIPE). The SEC's concentration of its resources on PIPE insider trading

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[9] Martin Dickson, *Insider Trading*, FIN. TIMES (London) June 24, 2005, at 22. Gerard Wynn, *UPDATE 1-Reuters Summit-UK to Probe for Hedge Fund Market Abuse*, REUTERS News, April 4, 2006.

[10] Gerard Wynn, *UPDATE 1-Reuters Summit-UK to Probe for Hedge Fund Market Abuse*, REUTERS News, April 4, 2006.

[11] *Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?* Hearing Before the U.S. Senate Comm. on the Judiciary, 109th Cong. (2006) (statement of Mr. Christopher K. Thomas, President, Measuredmarkets, Inc.).

[12] *Id.*, statement of Ms. Linda Thomsen, Director of Enforcement, U.S. Securities and Exchange Commission.

[13] "The number of enforcement cases against hedge fund advisers has grown from just four in 2001 to more than 90 since then." *Regulation of Hedge Funds*, Hearing Before the U.S. Senate Comm. on Banking, Housing, and Urban Affairs, 109th Cong. (2006) (statement of Christopher Cox Chairman, U.S. Securities & Exchange Commission).

[14] *SEC v. Deephaven Capital Management*, SEC Litigation Release No. 19683, (May 2, 2006); *SEC v. Langley Partners*, SEC Litigation Release No. 19607, (March 14, 2006); *SEC v. Hilary L. Shane*, SEC Litigation Release No. 19227 (May 18, 2005). The SEC has recovered approximately $26 million in these three case.

[15] *Id.*

cases is curious. The PIPE market is relatively small: $20 billion in 2005.[16] By comparison, the merger and acquisition market was $1.46 trillion over a recent twelve month period.[17] Put differently, the PIPE market is 1.4% of the merger and acquisition market. So why do half the SEC insider trading cases against hedge funds arise out of PIPE transactions? One obvious answer: the cases are easier to prove. The facts are relatively simple and follow a cookie cutter fact pattern.[18] Also, somebody did much of the spade work for the SEC. The cop on the street—the SEC—did not detect the PIPE insider trading. Rather, it was detected by a $100 billion mutual fund and the evidence was then handed over to the SEC.[19]

The SEC has brought three and only three cases against hedge funds or their principals *for all other types of insider trading*: *SEC v. Kornman*,[20] *SEC v. Tom*,[21] and *SEC v. Obus*.[22] In two of those cases, *Kornman* and *Tom*, the SEC sued the principals of two mini hedge funds.[23] In *Kornman*, the illegal profits were $142,000;[24] the SEC has recovered nothing.[25] In *Tom*, the illegal profits were $785,330 dollars;[26] the SEC has recovered $110,000 from marginal defendants, but nothing from Tom.[27] In *Obus*, the SEC sued a mid-sized hedge fund, its principal and two others.[28] It has recovered nothing so far. The only remarkable feature of *Obus* was the length of the investigation: it took

[16] *Pipe Dreaming: Once the Domain of "Death Spirals," The Market for Private Investments in Public Equities, or Pipes, Is Going Mainstream.* Institutional Investor Americas, October 2006, Vol. 40 No. 10, at 26.

[17] Belinda Cao, *Corporate Bond Sales Hit a Record in U.S., The* Int'l Herald Tribune, Nov. 6, 2006, at Finance 15.

[18] The facts follow the same pattern. A public company decides to raise money by making a private placement of its stock with the intent to register the stock a few months later. This is commonly known as a private investment in public equity or PIPE. A hedge fund agrees to purchase stock through the placement. The hedge fund also knows that the public announcement of the PIPE will depress the market price of the stock. Knowing that, the hedge fund shorts the company's stock and covers it with the private placement for a quick and sure profit. In executing the short, the hedge fund acts on material nonpublic information and violates the securities laws.

[19] "The focus on Pipes was prompted in part by complaints from a large mutual fund whose traders had noticed a pattern in which small-company stocks would decline in advance of a company's announcement of a Pipe deal, according to people familiar with the matter." Susan Pulliam, Stock-*Trading Cheats Are in the Cross Hairs*, WALL ST. J., July 8, 2004, at C1. "For Bradley, who gave the SEC a list about 18 months ago of companies whose stock might have traded irregularly after a PIPE deal, said there appeared to be a concerted effort to spread information in the market in an unaudited way." Herbert Lash, *Hedge Fund Instant Messaging Should Be Scrutinized*, Reuters News May 24, 2005.

[20] *SEC v. Gary M. Kornman*, SEC Litigation Release No. 18836 (August 18, 2004).

[21] *SEC v. Michael K.C. Tom*, SEC Litigation Release No. 19729 (June 15, 2006).

[22] *SEC v. Nelson J. Obus*, SEC Litigation Release No. 19667 (April 25, 2006).

[23] See *supra* notes 20 and 21.

[24] *SEC v. Gary M. Kornman, supra* note 20.

[25] The most recent order in the court's file, available on PACER, conditionally dismissed the SEC's complaint. There is a pending criminal case against Mr. Kornman.

[26] *SEC v. Michael K.C. Tom, supra*, note 21.

[27] *SEC v. Michael K.C. Tom, et al.*, SEC Litigation Release No. 19729, (June 15, 2006). The court file, available on PACER, reveals that Michael K.C. Tom has not settled or gone to trial on the SEC allegations. However, Tom was convicted of insider trading and received a six-month sentence. "Tom did plead guilty to insider trading and was sentenced to six months "in a community confinement facility." See: *Business in Brief*, THE BOSTON GLOBE Nov. 30, 2006, at D2.

[28] *SEC v. Nelson J. Obus*, SEC Litigation Release No. 19667 (April 25, 2006).

the SEC at least four years *to file the case* (not prove a case) against a hedge fund principal who repeatedly confessed his transgression to strangers.[29] To sum up, aside from the PIPE cases, SEC efforts to enforce the insider trading laws against hedge funds who engage in insider trading come to this: two cases against the principals of two tiny hedge funds, one case against a mid-sized hedge fund, *and a total of $110,000 recovered.*

To put in perspective the SEC's $110,000 recovery, it must be contrasted with the scale of illegal insider trading by hedge funds. It is doubtful that anyone has an accurate grasp of the total profits hedge funds derive from all types of insider trading. But some broad brush strokes may be put to the canvas in one area: insider trading profits by hedge funds related to mergers and acquisitions. The study commissioned by The New York Times found evidence of insider trading in advance of 41% of the largest US mergers and acquisitions.[30] The total dollar volume of US mergers and acquisitions was $1.46 trillion over a recent one-year period.[31] The FSA believes that much of this illegal trading is done by hedge funds.[32] Likewise, four of the witnesses who testified before your Committee on September 26, 2006, expressed a similar view.[33] One of the witnesses, Professor John Coffee, put it this way:

> [T]he more likely scenario is that information is leaked by their staffs [buy out and private equity firms] and by investment bankers to hedge funds and other active traders. These leaks are, however, not gratuitous; they are predictably in return for some likely *quid pro quo.* As hedge funds have come to dominate trading, they are often paying above market brokerage commissions, at least in comparison to other institutional investors. The funds paying these above-market commissions expect many things in return: ...hints about pending deals.[34]

All this suggests that hedge funds likely derive illegal profits from insider trading relating to mergers and acquisitions in the billions of dollars. The SEC's track record—its recovery of $110,000—is not likely much of a deterrent.

And then there was the PCM investigation. It involved eighteen referrals by Self-Regulatory Organizations (SROs) and one insider trading matter uncovered by staff. In the GE-Heller trades, PCM made a profit of $18 million from suspected insider trading. In the Microsoft trades, PCM made a profit of $12 million from suspected insider trading. All but two of the remaining seventeen matters involved suspected illegal profits in

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[29] See paragraphs 21 and 30 of the complaint in *SEC v. Obus*, available at http://www.sec.gov/litigation/complaints/2006/comp19667.pdf.

[30] See *supra*, note 11 and Gretchen Morgenson, *Whispers of Mergers Set off Bouts of Suspicious Trading*, N.Y. Times, Aug. 27, 2006, at A1.

[31] See Cao, *supra* note 17.

[32] See Fletcher, *supra* note 8, Dickson, *supra* note 9 and Wynn, *supra* note 10.

[33] *Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?* Hearing Before the U.S. Senate Comm. on the Judiciary, 109th Cong. (2006) (statements of Prof. James Cox, Prof. John Coffee, Mr. Robert Marchman, Executive Vice President of the NYSE, and Linda Thomsen, Director of the SEC Division of Enforcement).

[34] *Id.*, statement of Prof. John Coffee.

excess of $1 million. That investigation had begun to focus on the flow of illegal information from investment banks to PCM in March 2005.[35] That was months before the FSA expressed its concerns about "institutionalized insider trading" in the U.K. and more than a year before The New York Times raised the question whether the same thing was happening in the US.

The SEC's handling of PCM's suspected insider trading in GE-Heller fits the pattern of its overall handling of insider trading cases. It goes for the low hanging fruit, amateur traders who make stupid mistakes when they trade on illegal tips, but not the large, sophisticated hedge funds who do not make easy statistics. The SEC vigorously pursued an insider trading case against a low level GE executive and a Taiwanese Kung Fu instructor who split a $157,000 profit derived from trading Heller options.[36] The Department of Justice jumped in and exacted a guilty plea from one of the participants. The District Court sentenced him to fifteen months in prison.[37]

The NYSE likely highlighted PCM's trading to the SEC within months of PCM's July 2001 trades. The minimum SEC inquiry into PCM's trading in Heller would have raised one red flag after another. Simply checking PCM's trading in Heller for July 2001 would have revealed a $17 million profit, not the $5.97 million the NYSE found. Scratching a tad deeper would have revealed that PCM had bought more Heller stock ($44 million worth) than any individual or institution in the country during the four weeks before the announcement. Scratching a little deeper would have revealed that PCM had also sold shorted $36 million in GE stock, thereby positioning itself for the likely dip in GE's stock price when the tender offer was announced, which dip in fact occurred. The inescapable inference from these facts was that someone at PCM had a strong belief that GE would acquire Heller. By that point, the SEC would have to ask PCM one simple question: Why did you bet $80 million that GE would acquire Heller? That question would not be addressed to PCM and its CEO for another four years.

To sum up, the PCM investigation had focused on a new type of insider trading of global dimensions, "institutionalized insider trading." The investment bank under investigation was the third largest in the world at the time. The hedge fund was the largest in the world at the time and was suspected of routinely engaging in insider trading. Given the SEC's failure to look at this area before, it was critical to the capital markets that the investigation be thorough. Instead, senior Enforcement officials halted the investigation by blocking the issuance of any subpoenas to the only suspected tipper.

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[35] All the emails referenced in the footnotes, to this testimony, including this one have been previously provided to Committee staff. See my March 1, 2005, email to Robert Hanson (Hanson), Eric Ribelin (Ribelin), Hilton Foster (Foster) and Mark Kreitman (Kreitman). With this email I informed my supervisors and other staff working on the PCM investigation: "I think we should also serve subpoenas on key broker-dealers, such as Goldman and Morgan Stanley, whose ties to Pequot propitious timing seem to be frequent." I issued subpoenas to Goldman Sachs and Morgan Stanley later that month for records relating to their prime brokerage and trading relationships with PCM.

[36] Reuters, *2 Men Are Accused Of Insider Trading*, N.Y. TIMES, July 30, 2002 at C1.

[37] Reuters, *Former Executive Pleads Guilty,* N.Y. TIMES, October 23, 2002 at C2.

But it gets worse. The suspected tipper was the incoming CEO of the investment bank. The suspected tippee was the CEO of the hedge fund. If those at the top of these pyramids believe that insider trading is an acceptable business risk, their subordinates—everyone else in both companies—will not likely have higher standards. *It is hard to imagine how the SEC could have given a favor more damaging to the capital markets.*

The Status of the PCM Insider Trading by June 2005

The investigations of Samberg's and Mack's roles as the possible tippee and tipper in the GE-Heller matter were interdependent in two ways. First, as discussed below, the circumstances surrounding Samberg's trading in GE and Heller in July 2001 defined the profile of the person who likely tipped him. Only Mack fit the profile. Second, when senior SEC officials blocked the subpoena for the only person who met the tipper's profile, they rang the death knell on proving the case against Samberg and PCM. No insider trading case can be proved without establishing the source of the tip.

PCM's History of Suspected Insider Trading

There were multiple reasons in 2005 to scrutinize Samberg's and PCM's trading over the prior few years for the use of illegal tips. Market surveillance officials of the NYSE told me that PCM and two other hedge funds, which they named, had most often been the subject of insider trading referrals to the SEC in recent years. One of those officials put it this way: "PCM was just too lucky." In the fall of 2004, I had located thirteen other insider trading matters which SROs had referred or highlighted to the SEC over the prior three years involving PCM. None had been investigated. SROs referred another four insider trading matters over the next few months. In response to an SEC subpoena, PCM produced records of yet other SRO referrals. The SEC's New York District Office was also conducting a separate investigation of PCM for possible insider trading arising out of a PIPE transaction. Independently, Hilton Foster (Foster), perhaps the most experienced SEC attorney at conducting insider trading investigations, told me that he had investigated PCM a decade earlier and suspected Samberg and PCM were "serial inside traders."[38]

There was also the money PCM paid to its brokers-dealers: $226 million during the twelve month period in which it did the GE-Heller trades.[39] PCM paid an "average commission rate" to its brokers of five cents a share.[40] These trades could have been executed for as little as a penny a share electronically.[41] PCM also paid many more millions in fees to its prime brokers. In return for these fees, hedge funds in general,[42] and

[38] See my October 8, 2004, email to Cain and Grime.

[39] A copy of this document was provided to Committee staff as Ex. 25 to my letter of August 21, 2006, to Senator Shelby.

[40] *Id.* During a phone interview, a senior Morgan Stanley trader told several staff members including me that PCM usually paid five cents a share for executing its trades.

[41] Ianthe Jeanne Dugan, *In the Loop: How Inside Stock Tips Still Flow Despite Regulatory Crackdowns—Some Hedge Funds, Especially, Find Ways Around Efforts To Level the Playing Field—Heads-Up on a Rating Change,* WALL ST. J., August 27, 2004.

[42] *Id.*

PCM in particular,[43] received favors and information. The key question is where the broker-dealers drew the line on the type of favors and information they gave PCM and where PCM drew the line in receiving them.

Then there was the obvious good-twin bad-twin comparison between PCM and Andor Capital Management (Andor). Andor was formed in September 2001 when PCM cofounders, Samberg and Daniel Benton (Benton), split up PCM's employees and its $15 billion in assets. Samberg would continue with PCM, but with half the assets to manage. Andor would go its separate way, with the other $7.5 billion to manage. I could find few SRO referrals of Andor in comparison with PCM from 2001 through 2005. I also asked Eric Ribelin (Ribelin), a branch chief in the SEC's Office of Market Surveillance, if he could get an exact number of the referrals on Andor. Ribelin responded: "The referrals are by issuer, not by account that traded, so there is no electronic way to key on it. Put it this way, before you mentioned Andor I'd never heard the name. I've seen and heard Pequot's name for years in referrals and in conversations with SROs."[44]

Finally, Samberg sought nonpublic information on another company shortly before he was suspected of obtaining the Heller tip from Mack. In April 2001, Samberg hired David Zilkha out of Microsoft, where he was employed as a product manager. The emails between Samberg and Zilkha show Zilkha obtaining nonpublic information from his contacts at Microsoft, on some occasions while Zilkha was still working at Microsoft, and passing it along to Samberg. When I left the SEC, gaps in the evidence prevented Enforcement from using these emails as a basis for a separate insider trading case against PCM and Samberg. However, we saw these emails as a window into how Samberg operated and thus they provided a clue to the mystery why he bet $80 million in July 2001 that GE would acquire Heller without any data supporting his bet.

Samberg began pumping Zilkha for information almost two months before he left Microsoft. Samberg's first email to Zilkha on February 28, 2001, asked: "Do you have any current view [on Microsoft] that could be helpful? Might as well pick your brain before you go on the payroll!!"[45] The reply did not appear to pass along material nonpublic information.[46]

Later, Samberg's emails became more direct. On April 30, after Zilkha had joined PCM, Samberg emailed Zilkha, asking: "those [MSFT] contacts have any views on the direct tv—Murdoch—rumored msft possible deal?"[47] This email shows Samberg using Zilkha to confirm —through his Microsoft contacts—whether the rumor was true that Microsoft would participate in a joint acquisition of DIRECTV.

In another email, Zilkha reported back:

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[43] *Supra*, note 39.
[44] See Ribelin's February 3, 2005, email to me.
[45] See Samberg's February 28, 2001, email to Zilkha.
[46] *Id.*
[47] See Samberg's April 30, 2001, email to Zilkha.

Just spoke to one of my buds in the company [Microsoft]. He had 2 data points.

1) Orlando Ayala, in charge of sales worldwide, told managers this week that the quarter looks to end on a strong note.
2) Bob McDowell, in charge of Microsoft Consulting, told my friend that MCS was having a blow out quarter.

I asked about negative data points and he said he hadn't heard of any. [48]

In another email, Samberg directed Zilkha that information obtained from Zilkha's contacts within Microsoft should not be shared with an analyst. Zilkha and Samberg had this edited exchange about Microsoft's expected earnings:

> Zilkha: I told Sherlund [an analyst] on the call that MSFT [Microsoft ticker symbol] was anticipating beating earnings for the Q as of last Thursday. He asked if me whether he could put out a note talking up MSFT. I told him I'd let him know tomorrow after I heard back from my contact--and had gotten your take on what we would like we'd like him to do.[49]
>
> Samberg: As to msft, I don't want to be associated with anything Sherlund [stock analyst] does. If, after talking to you he feels comfortable with the stock, fine, *but we absolutely should not be relaying info to him about what you had learned via contacts within the company.* [50]

Here is another Samberg-Zilkha exchange, while Zilkha was still employed by Microsoft, on April 7:

> Samberg: I own some msft on the win2000 cycle, despite recurring indications from knowledgeable people that the company will either preannounce or take guidance down. Any tidbits you care to lob in would be appreciated.[51]
>
> Zilkha: I will get back to you on MSFT ASAP.[52]

Zilkha did not reply by email, at least in no email that Enforcement staff could find, so there was no proof what he told Samberg. However, between April 9 and 11, Samberg bought 30,000 options contracts on the assumption that Microsoft would beat its

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[48] See Zilkha's June 15, 2001, email to Samberg.
[49] See Zilkha's June 18, 2001, email to Samberg.
[50] *Id.* On the same day, Reuters said there was "Mounting speculation about a profit warning from Microsoft." *Eurostocks down, techs hit again by Microsoft talk*, REUTERS News, June 15, 2001.
[51] See Samberg's April 6, 2001, email to Zilkha.
[52] *Id.*

earnings, the reverse of his belief stated in his email.[53] On April 20, Microsoft did in fact beat its earnings. Samberg made a $12 million profit on his April 9-11 option trades.[54]

On April 23, Zilkha's first day at PCM, Samberg sent him an email: "I shouldn't say this, but you have probably paid for yourself already!"[55] Samberg emailed two other PCM executives on the same day: "our new guy, david zilkha [sic], is in ct today. check [sic] him out. He's already got a great p&l [profit and loss] on his msft input."[56] *Zilkha had earned his "great p&l" with PCM while still an employee of Microsoft.*[57]

In general, the Samberg-Zilkha emails were anomalous. The evidence suggests two reasons. First, Samberg likely used instant messaging when he did not wish to leave a trail, which would have been the case if he was soliciting or receiving material nonpublic information.[58] Instant messaging left no telltale image in any server or computer. Second, Samberg was under pressure to perform after April 2001, when his partner announced he intended to leave with half of PCM's assets and thus Samberg may have taken greater risks than usual.[59]

Samberg's Testimony Advanced the Investigation of PCM's Trading in GE and Heller

The first subpoenas to PCM were issued in early February 2005. In April and May, PCM began producing significant volumes of its records.[60] I took Samberg's testimony in early May and again in early June 2005. By early June 2005, the evidence suggested that Samberg had relied on an illegal tip in directing PCM's trades in GE and Heller. I summarized that evidence in my email of June 27, 2005, to Ribelin, who attended both sessions of Samberg's testimony, Assistant Director Mark Kreitman (Kreitman), and Hanson.[61]

The first aspect of Samberg's and PCM's trading in Heller and GE to attract our attention was its size. Samberg directed PCM to purchase $44 million in Heller stock from July 2 through July 27, 2001. That made PCM the largest purchaser of Heller stock in the nation during the four weeks just before the acquisition was announced.[62] But even those purchases were not enough; Samberg was trying to buy larger blocks of Heller stock.[63] This raised the obvious question: What did Samberg find so attractive about

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[53] A copy of this document, the timeline of events, was provided to Committee staff as ex. 12 to my letter of August 21, 2006, to Senator Shelby.

[54] *Id.*

[55] See Samberg's April 20, 2001, email to Zilkha.

[56] See Samberg April 23, 2001, email to Broach and Schendel.

[57] I was fired before I had the opportunity to question Samberg about Zilkha.

[58] See Shash Patel's March 14, 2003, email on instant messaging and Samberg's May 23, 2001, email to Zilkha.

[59] Gregory Zuckerman, *Pequot Partners Split as Benton Plans to Launch His Own Funds,* WALL ST. J., April 4, 2001, at C1; See also my June 27, 2005, email to Kreitman, Hanson and Ribelin.

[60] See my May 9, 2005, email to Florschutz, Kreitman and Hanson.

[61] See my June 27, 2005, email to Kreitman, Hanson and Ribelin.

[62] See my August 4, 2005, email to Hanson.

[63] See my June 27, 2005, email to Kreitman, Hanson and Ribelin.

Heller that he was willing to outbid everyone else in the country to own it, including those who followed it closely?

The same was true of Samberg's trades in GE. Samberg directed $36 million in shorts on GE, but that was also not enough. He was trying to short even larger amounts.[64] Again, why did Samberg have the conviction that GE was going to fall?

I was looking for answers to these questions when I took Samberg's testimony, but did not get them. At the first session of his testimony in early May, Samberg gave six reasons for his decision to buy Heller stock. Before the second session, I subpoenaed the documents that his lawyers had shown Samberg before he testified. It turned out that Samberg's attorneys, and not Samberg, had done the research why Samberg bought Heller in 2001, but that research was done four years after Samberg had directed the trades. None of the records Samberg's attorneys had shown him came from PCM's or Samberg's files.[65] Nor could Samberg recall ever seeing these records before. In short, his attorneys had spoon-fed him his testimony.[66]

Independently, Samberg eliminated any legitimate source of information for his decisions to buy Heller stock. Samberg said he spoke with no one regarding his decision to purchase Heller stock: not any of PCM's 250-person staff, not anyone at Heller (contrary to his practice),[67] not anyone at any financial services company, and not any analyst or consultant. Nor did he recall seeing any newspaper articles about Heller.[68] Samberg testified that Heller was in an industry outside the focus of his hedge fund, that he did not follow Heller "in the way people follow stocks before it [sic] was purchased."[69] Samberg also said his decision to purchase Heller in July 2001 had "nothing to do with Heller."

Finally, in the millions of records PCM produced, only two had any reference to PCM's trading in Heller. In one, Samberg asked his trader, "where are we on HF?"[70] In the other, Samberg replied to an email informing him the acquisition of Heller had just become public and the resulting 50% leap in its stock price. Samberg replied: :) :) :) :) :) :) Samberg could recall no other e-mails relating to Heller.[71]

Incidentally, the smiley face—:)—showed up in two other emails that caught our attention. Joseph Samberg, the president of his own hedge fund and son of Arthur

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* Samberg told Fortune Magazine in 1998 that he attributed PCM's high returns to its practice of contacting public companies for information. He testified that PCM had continued this practice in 2001. "The investment staff visits thousands of companies each year, conducts extensive interviews with management as well as competitors, suppliers, distributors, and customers." Lawrence A. Armour, *A Hedge Fund Winner; Ignoring Wall Street Research Pays Off,* FORTUNE, October 12, 1998, at 224.
[68] See my June 27, 2005, email to Kreitman, Hanson and Ribelin.
[69] *Id.*
[70] *Id.*
[71] *Id.*

Samberg,[72] sent an email to his father on July 12, 2001, offering this insight about Mack stepping in as CSFB's new CEO:

> If you read the front page of the C Section of the WSJ, you will see that our friend and latest investor [in Joseph Samberg's hedge fund], John Mack, is to become the new CEO of CFSB, the no.2 underwriter in the U.S.! It's nice to have friends in high places...:)[73]

On September 26, 2001, Samberg also sent this email to another prominent hedge fund manager: "don't know most of the things I'm buying. :-)"[74] That was clearly true when Samberg directed PCM to buy $44 million in Heller stock.

Samberg claimed he saw an analyst's report in July 2001 like the one his attorneys showed him before he testified in 2005. Neither PCM nor Samberg produced such a report. Nor was there a hint of one in the documents PCM produced in response to SEC subpoenas. Here is Samberg's testimony at the second session on (1) the report shown to him by his attorneys before the first session of his testimony and (2) the one he claimed he saw in July 2001:

> Q Have you seen this report in any e-mail dated before July 30, 2001?
> A I don't recall seeing it.
> Q Do you have a high regard for sell side analysts?
> A I have a high regard for them as people. I don't have a high regard for using their reports to make investment decisions.
> Q It would have been very unusual for you to rely on a sell side report, would it not, in making an investment decision?
> A Historically, that is true.
> Q In fact, isn't it true, sir, that you don't think they're worth a damn?
> A In general, I don't think their reports are worth a damn. The people can be, but not the reports
> Q Right. And you've made that statement publicly, have you not?
> A I have.
> Q So this is -- Exhibit 19A is sell side research, is it not, sir?
> A Sure is.
> Q Exactly what you said isn't worth a damn. Correct?
> A You bet.
> Q So is it fair to say that the research you saw in July 2001 about Heller Financial also wasn't worth a damn?
> A I really don't know what I saw.[75]

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[72] Mark Veverka, *The Games People Play II: A Winning Hand in Cellphone Poker*, BARRON'S, September 5, 2005, at 28.

[73] See my June 3, 2005, email to Hanson, Kreitman, Ribelin, Foster, Jim Eichner (Eichner), Tom Conroy (Conroy), Stephen Glasco (Glasco) and Nancy Miller (Miller).

[74] See Samberg's September 26, 2001 email to DiMenna.

[75] See my June 27, 2005, email to Kreitman, Hanson, and Ribelin.

Samberg also described a host of practices PCM normally followed in making trading decisions in 2001.[76] These practices included:

1) "Pequot Capital's investment process begins with an intensive research of a company's underlying fundamentals."

2) "Investment ideas [were] generated as a result of meetings directly with company senior management teams [and that] this [allowed] the investment team to understand a company's management structure, thought process, strategic direction, and products."

3) "In-depth meetings and industry research provides the research to prospective fund's analysts with an overview of a particular industry as well as the individual company, and allows for comparisons to be made within that specific industry."

4) "Based on research, the investment analyst is able to formulate business models and discuss their ideas with other members of the investment staff and the respective fund's portfolio manager prior to a position being included within the portfolio."

5) "The investment approach [quoted above] is consistent across all funds managed by Pequot Capital."[77]

According to his testimony, Samberg followed none of these practices in directing $80 million in trades in Heller and GE in July 2001. Nor was there any clue in PCM's records that any of these practices had been followed.[78]

Samberg also offered no explanation for his decision to place $36 million in shorts on GE. He testified:

> Q Now, two months later, almost two months later, there is a short by you, sir, on July 25, 2001 in the amount of 756,000 shares or just shy of $33 million.
> Q Do you see that, sir? [I was showing Samberg GE trade blotter]
> A I do.
> Q Now, can you tell us the reasons that you felt that GE should be shorted at that particular time?
> A No, I can't.

Likewise, PCM produced no records that could explain Samberg's decision to short sell $36 million in GE stock.[79]

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

This was the status of the case against Samberg and PCM in early June 2005. I understood, and my supervisors told me, that no case could ever be filed against PCM and Samberg without proof who had tipped Samberg. Other staff and I began combing through the PCM records for any clue of the tipper's identity. During the second session of his testimony, I questioned Samberg whether he knew any of the individuals who had participated in the acquisition. That produced two weak leads which I later eliminated. In early June, evidence began to point to Mack. By August, the evidence indicated that Mack, and only Mack, met every element of the tipper's profile.[80]

The Decision to Take Testimony: The Standard for Everybody Other than Mack

Before discussing how my supervisors reacted to my request to subpoena Mack, I discuss first how they reacted to my request to subpoena everyone else. Those two reactions were as different as night and day. During the investigation, I issued over ninety subpoenas. Of those, I served approximately thirty subpoenas on PCM—five on PCM for records and the rest on officers, portfolio managers, traders and other staff. The other sixty or so were served on third parties, mostly public companies and investment banks.

From the standpoint of authority, I did not need my supervisors' approval or consent to issue a subpoena. The Commission's formal order in the PCM investigation provided: "Gary J. Aguirre [and others]...and each of them, be, and hereby ...are empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, require the production of books..."[81] However, my superiors could of course override my decision to issue a particular subpoena.

Until Mack, I merely informed my superiors who I intended to subpoena and invited their feedback. For example, on February 18, 2005, I emailed Hanson and Kreitman informing them of my intention to subpoena twenty-seven individuals.[82] Of those twenty-seven individuals, seventeen were employed by PCM, five were officers of public companies (including the CEO and CFO of one company), and another five were investment bankers. In general, the person subpoenaed was suspected of giving or receiving material nonpublic information. Neither Kreitman nor Hanson asked why I had decided to issue any of the subpoenas. Neither requested that I make any factual showing why the witness was believed to have received or provided material nonpublic information.[83] Indeed, neither Hanson nor Kreitman even responded to my email.

Further, far more evidence implicated Mack than any of the twenty-seven individuals whose subpoenas Kreitman and Hanson approved by their silence. For example, no evidence indicated any of the five investment bankers even knew the PCM employee who did the suspected illegal trades. By contrast, in Mack's case, Mack and Samberg knew and trusted each other, had shared stock tips, and spoke just before Samberg began to direct the Heller trades. Then there was the fact that Mack met the

[80] See my August 4, 2005, email to Hanson.
[81] See my December 16, 2005, email to Richard Grime.
[82] See my February 18, 2005, email to Hanson and Kreitman.
[83] *Id.*

tipper's likely profile.[84] No comparable evidence existed for *any* of the other twenty-seven suspected tippers or tippees *before* Kreitman and Hanson authorized the twenty-seven subpoenas to be issued by their silence.

My supervisors approved the remaining seventy or so subpoenas in much the same way. I recall no occasion where my supervisors and I even discussed the need for a stronger factual showing before a subpoena could be issued. Only the Mack subpoena had that precondition and the required factual showing constantly changed.

But the issuance of subpoenas was not the only one way of obtaining information from witnesses or suspected tippers or tippees. A simpler way was to contact them by phone, usually done by two or more Enforcement staff members, and then question them about the relevant facts. In February 2005, Kreitman gave *carte blanche* to two staff members working on the PCM investigation to contact all former PCM employees, officers, and directors—more than 200 individuals.

The Reasons for Taking Mack's Testimony

The reasons for taking Mack's testimony are discussed next. My lengthy emails of August 4, 2005, and August 24, 2005, *again* explained to Hanson and Associate Director Paul Berger (Berger) why I believed Mack's testimony was the next logical step in the investigation. The email began:

> You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. [Third] If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.[85]

The primary reason to subpoena Mack and his records was the fact that he matched the profile of the likely tipper. This process—comparing the elements of the likely tipper's profile with the suspect's profile—was only done with Mack. The evidence implicating Mack, whose testimony was never taken, was more compelling than the evidence implicating any other suspected tippers or tippees before their subpoenas were

[84] See *infra* p. 17-18.

[85] See my emails of August 4, 2005, to Hanson, and August 24, 2005, to Berger. Both emails have an error. A paragraph describing Samberg reads: "We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million." That was the amount of Samberg's holdings in Pequot, not Mack's.

issued. My supervisors approved the first subpoenas for these thirty or so individuals without comment.

In analyzing the evidence suggesting Mack tipped Samberg, several factors should be kept in mind. First, no evidence came from Mack. Unlike Samberg, *no* subpoena was served on Mack, not even a records subpoena. He therefore produced no emails, phone records, personal calendar, credit card statements or other records which are usually critical in developing an insider trading case.[86] The standard SEC practice is to seek records from the suspected tipper and tippee. From these records, the case is built pebble by pebble until the mosaic becomes visible. That practice was followed in the PCM investigation, except for Mack. The evidence suggesting Mack was the tipper came exclusively from Samberg, PCM and third party sources.

For the same reason, the strength of the evidence against Mack cannot be compared with the evidence against Samberg. Multiple subpoenas had been served on both PCM and Samberg seeking evidence that he had used material nonpublic information in directing the GE and Heller trades. Samberg had also testified twice. Most of the evidence against Samberg comes from the two sessions of his testimony.[87]

Another factor to be kept in mind was the purpose of presenting the evidence to my supervisors indicating Mack had tipped Samberg. The sole issue was whether there was enough evidence *to issue a subpoena to Mack.* No one suggested there was enough evidence to file a case against Mack or Samberg or that we should even consider filing a case after Mack's testimony was taken.[88] Until Mack, neither Hanson nor Kreitman had required any evidentiary showing before a subpoena could be issued for the testimony of a suspected tipper or tippee. Nor had they offered a rational explanation what evidence would be required before Mack's testimony could be taken. My email-memos to them summarizing the Mack evidence went unanswered. In that void, I provided a standard: Mack met the profile of the suspected tipper.[89]

Finally, I discuss below the status of the evidence in August 2005. I began to inform my supervisors of the evidence involving Mack in early June. By mid-June 2005,

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[86] See *infra* pp. 41-42.

[87] See my June 27, 2005, email to Kreitman, Hanson, and Ribelin.

[88] To the contrary, I told my supervisors that Mack's testimony was a critical intermediary step in the investigation:

> Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

See my August 4, 2005, email to Hanson.

[89] The elements considered in the tipper's profile are very similar to the factors typically considered in proving an insider trading case. See *infra* pp. 41-42.

my supervisors authorized me to present the GE-Heller matter to the FBI and US Attorney in connection with a possible criminal investigation, including Mack and Samberg's possible roles as tipper and tippee. The evidence suggesting that Mack was the tipper continued to strengthen in July and August. *Yet, even with stronger facts, my supervisors would not allow an administrative subpoena to be issued for Mack, even though they were willing to seek a criminal investigation on lesser evidence two months earlier.*

The Profile of the Tipper in the GE-Heller Matter

The profile of the tipper arose out of the trading that Samberg directed. It had these elements:

1) The tipper would have had potential access to information that GE would make a tender offer for Heller;
2) The tipper likely spoke with Samberg *shortly* before he began to trade;
3) The tipper likely obtained the information *shortly* before he provided it to Samberg;
4) The tipper should have had one or more motives for tipping Samberg;
5) The tipper and Samberg likely trusted each other.[90]

As discussed below, only Mack satisfied each element of the profile.

Mack Had Potential Access to Information that GE Intended to Acquire Heller.

Mack had potential access to information from either of two possible sources. He left Morgan Stanley in late March 2001. Morgan Stanley advised GE on the Heller acquisition since May 2001. Mack was known to have had strong contacts with the investment bankers at Morgan Stanley.[91] No investigation of Mack's communications with his contacts at Morgan Stanley was possible for several reasons. First, my supervisors blocked even a records subpoena to Mack for his emails, phone records or calendar, the customary way of ascertaining those facts. Second, Morgan Stanley made a practice of destroying emails during the period in question.[92] Finally, after Mack stepped in as CEO, Morgan Stanley reversed its position that it would search through backup tapes for Mack emails.[93]

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[90] See my emails of June 6, 2005, and June 20, 2005, to Hanson; my email of June 28, 2005, to Hanson, Ribelin and Kreitman; my email of July 27, 2005, to Kreitman and Berger; and my email of August 4, 2005, to Hanson.

[91] *Id.*

[92]

> The firm claimed it hadn't retained emails related to numerous big investigations when in fact it had. The SEC alleges the firm destroyed other emails it was required to keep. During settlement negotiations, regulators discussed but opted not to provide some recourse for small investors affected by the document problems, according to people familiar with the discussions.

Susanne Craig, *New Morgan Stanley Has Old Troubles Over Emails, Investor-Lawsuit Clouds*, WALL ST. J., May 24, 2006, at C1.

[93] See my July 19, 2005, email to Kreitman, Hanson, Ribelin, Eichner, and Jama.

The evidence pointed more concretely to another source. According to Business Week, Credit Suisse (CS) had been "wooing" Mack to step in as the CEO of Credit Suisse First Boston (CSFB) since April 2001.[94] But CS had competition. Merrill Lynch was also "wooing" Mack.[95] That year, Merrill Lynch ranked as the top investment banker in the world and CSFB ranked third.[96] In making a choice between Merrill Lynch and CSFB, Mack—known as the "dealmaker"—would likely want to know what significant deals CSFB already had in its inventory. For the same reason, CSFB had a motive to tout its significant deals, like the Heller acquisition, to help "woo" Mack away from the number one investment bank, Merrill Lynch.[97] The Heller acquisition was the second largest GE had ever made.[98] It could also have been mentioned by CSFB's CFO as something Mack would step into when he started with CSFB two weeks later, on July 12, since the tender offer would be announced eighteen days later, on July 30, 2001.

Mack's Contacts with Samberg

As discussed above, at Samberg's direction, PCM was the largest purchaser of Heller stock during July 2001. Samberg would likely have started his accumulation of Heller earlier than July 2, 2001, if he had got the tip earlier. Hence, Samberg likely received the tip shortly before he began trading on July 2, 2001. Accordingly, other staff and I combed through the records PCM and Samberg produced looking for someone who (1) had contact with Samberg shortly before July 2 and (2) had some reason to know about GE's efforts to acquire Heller. Working back in time from July 2, we found only one person: Mack. Samberg spoke with Mack on Friday June 29, 2001, after the close of the market.[99] That matched perfectly with Samberg's decision to begin buying Heller with a vengeance *the next trading day after he spoke with Mack.* In searching through Samberg's emails, calendar, and phone and credit card records over the summer of 2005, I found no other leads to a possible source of the GE-Heller tip to Samberg. In August, I informed Hanson and Berger of that fact.[100]

Mack's Contacts with CSFB: The Right Contacts at the Right Time.

The key trading dates for Samberg were July 2, 2001, July 10, 2001, and July 25, 2001.[101] On July 2, 2001, Samberg first traded Heller. Samberg increased his buy order with PCM's trader from 15,000 shares on July 9 to 455,000 on July 10. Samberg began

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[94] David Fairlamb and Emily Thornton, *Is John Mack's Knife Sharp Enough?,* BUSINESS WEEK, July 30, 2001, at 76.

[95] See my August 4, 2005, email to Hanson and Poch's June 30, 2001, email to Samberg. *John The Apostle; The New Head of CSFB Preaches Teamwork and Promises to Exorcise the Bank's Demons. Can John Mack Perform a Miraculous Turnaround? FORTUNE August 13, 2001* at 30.

[96] Fairlamb & Thornton, *supra,* note 94.

[97] See my August 4, 2005, email to Hanson.

[98] Nikhil Deogun and Matt Murray, *GE Capital to Acquire Heller Financial—Deal Price of $5.3 Billion Means Specialty Lender Will Fetch Big Premium,* WALL ST. J., July 30, 2001, at A3.

[99] See Samberg's email of June 30, 2001, to Jerry Poch; my June 27, 2005, email to Kreitman, Hanson and Ribelin; the June 20, 2005, string of emails between me and Hanson; my August 4, 2005, email to Hanson; my June 6, 2005, email to Hanson and others; and my July 27, 2005, email with attachments to Kreitman and Berger.

[100] See my August 4, 2005, email to Hanson and my August 24, 2005, email to Berger.

[101] See my June 27, 2005, email to Kreitman, Hanson and Ribelin.

placing his $36 million in GE shorts on July 25.[102] This suggests that the tipper told Samberg about the pending Heller acquisition shortly before July 2, and then gave Samberg updates around July 9 and again around July 25.[103] These trading patterns also imply that the tipper got his information shortly before July 2, July 10, and July 25.

Mack had potential access to information about the GE-Heller acquisition through his contacts with CS and CSFB in May and June 2001. Mack dealt primarily with the CS chairman about stepping in as the CEO of CSFB. Mack could have learned about Heller from him. However, the CS chairman conducted his negotiations with Mack from CS's headquarters in Switzerland, according to a CSFB attorney,[104] which was of course beyond the reach of SEC subpoenas.[105] The same attorney informed me that there were also potential issues under Swiss privacy law if we were to seek the cooperation of Swiss Government in obtaining compliance with an SEC subpoena. He offered the obvious solution: "Why don't you get this stuff from Mack?"[106]

But Mack also had two meetings with CSFB's CFO in the US that fit nicely with Samberg's trading pattern. The first meeting was around June 28, according to the same CSFB attorney.[107] Again, one topic of keen interest for Mack would have been CSFB's pending deals. On the evening of June 29, Mack phoned Samberg.[108] We suspected that Mack may have tipped Samberg about Heller during this call. *The next trading day, Monday, July 2, Samberg began buying huge blocks of Heller.*[109]

Mack had the second meeting with CSFB's CFO on approximately July 9, 2001, according to the same CSFB attorney. That correlates with one of the dates GE "bumped"

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[102] *Id.*

[103] We had not found a contact between Mack and Samberg around July 9 or July 25. However, our records from PCM and Samberg were incomplete. Samberg's personal and PCM phone records were incomplete for 2001. The same was true of PCM's production of Samberg emails for 2001. I informed Hanson by email on June 1, 2005, that I suspected PCM or its attorneys had held back Samberg emails for 2001. For example, PCM had produced 837 Samberg emails for July 2001, when PCM managed $15 billion in assets and had 250 employees and 3,337 Samberg emails in July 2002, when it was half its former size due to the Andor spin-off. Further, Samberg produced none of his instant messages for this period since it had not been saved. Of course, we had no records from Mack to check, because of the subpoena bar.

[104] See my August 17, 2005, email to Kreitman and Hanson.

[105] *Id.*

[106] See my July 11, 2005, email to Hanson.

[107] See my August 17, 2005, email to Kreitman and Hanson and my August 4, 2005, email to Hanson. Since no subpoena could be issued for Mack's calendar or other records, the information from the CSFB attorney could not be verified. Also, this attorney reported to Gary Lynch, CSFB's General Counsel and a close business associate of Mack. I advised my supervisors about my concerns that Lynch was orchestrating the document production for CSFB relating to Mack. See my July 19, 2005, email to Kreitman, Hanson and other staff ("Lynch will thus be in a position to have orchestrated the document production from both CSFB and Morgan Stanley relating to Mack.") and my August 24, 2005, email to Hanson ("Since documents are being filtered by Lynch, and may not exit anyway, there can be no miracle leap over 9' bar."). In short, I doubted that the CSFB General Counsel had given us the full story regarding Mack's contacts with CSFB or CS during the critical period (June 27 through June 29) just before Samberg began trading in Heller. The contacts may have been far more extensive than Lynch and his subordinate told us.

[108] See Samberg's June 30, 2001, email to Poch.

[109] See my June 27, 2005, email to Kreitman, Hanson and Ribelin.

its offer for Heller.[110] The Mack meeting with CSFB's CEO, during which Mack could have received an update on the pending acquisition, fit nicely with Samberg's dramatic move on July 10.[111] Finally Mack became CEO of CSFB on July 12, 2001, two weeks before July 25, 2001, when Samberg began placing his $36 million in shorts on GE.[112] As CSFB's CEO, Mack would likely have been receiving status reports on the pending GE acquisition of Heller.

I summarized this information to Hanson on August 4 and Berger on August 24:

> He [Mack] also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time.[113]

Mack's Motive for Tipping Samberg

There were a number of motives for Mack to tip Samberg:

1) Mack was admitted directly into special PCM deals. One key deal went by the code name "Fresh Start," a Lucent spin-off which PCM got into extremely cheap.[114] Mack was promised a $5 million piece of Fresh Start the same night in which he was suspected of giving Samberg the Heller tip. Just nine days earlier, according to a Samberg email, Mack was "beating [Samberg's] chops" to get into Fresh Start. Neither the PCM principals nor Samberg's son seemed happy about Mack getting into Fresh Start.[115] SEC filings indicate Mack did extremely well on his $5 million investment.[116]

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[110] *Id.*

[111] *Id.* See also my August 4, 2005, email to Hanson.

[112] *Id.*

[113] *Id.*

[114] My June 29, 2005, email to Kreitman put in this way: "Mack was admitted directly into Pequot deals, e.g., the night that Mack is suspected of giving Samberg the tip, Samberg arranged for Mack to get a $5 million piece of a Lucent investment subsidiary that was being sold at a fire sale ..."

[115] See my August 4, 2005, email to Hanson; and my August 24, 2005, email to Berger.

[116] Fresh Start became Celiant Corporation. It was initially co-owned by PCM and Lucent. Mack bought 3,333,333 shares of preferred stock directly from Celiant for $5 million. (See page 21, Andrew Corp Form 8-K/A for the period ending June 4, 2002), the same terms and conditions under which PCM acquired its 33,333,333 shares. On February 19, 2002, Andrews Corp filed an 8-K with the SEC stating that it would buy all outstanding Celiant stock for $469.8 million: $203.1 million in cash and $266.6 million in stock. The merger agreement provided that Celiant preferred shareholders, such as Mack and PCM, would split $119.6 million in cash and the 16.28 million shares of Andrew Corp. common stock. Mack owned 4.26% of the outstanding preferred stock. Hence, under the terms announced in the February 19, 2002, and the June 4, 2002, Form 8-K/A, the value of Mack's interest would have been approximately $16.43 million. However, the stock would not be issued until June 2002 and would not be registered until September 2002. (See Andrew Corp Form 424B3).

2) Mack, his wife and their foundation were invested in as many as fifteen PCM funds.[117] Hence, PCM's profits on insider trading also benefited Mack. For example, Samberg allocated at least $5.4 million in profits from his GE-HF trades to Pequot Partners, a fund that Mack got into shortly before the GE-Heller trades.[118]

3) Mack got to put at least $7 million (likely much more) into PCM funds that were already closed, except for those with "important business contacts." These funds had sensational returns at that time. For example, Samberg's emails and spreadsheet of Mack's investments indicate Mack or his wife poured millions into the Pequot Scout Fund. It had a 677% return during the eight years prior to June 20, 2002.[119] Samberg's attitude toward making exceptions for well connected investors was reflected in his email of July 2, 2001: "the only fund open now is partners, and although the min is $5mm, we are always willing to make significant exceptions for *important industry contacts* (emphais added)."[120] Mack, his wife or their foundation invested money in fifteen PCM hedge funds, which usually had a $5 million minimum.[121]

4) Mack and Samberg solicited and obtained stock tips from each other. One of Samberg's emails to Mack in April 2001, shortly after Mack left Morgan Stanley, asked Mack for information about Morgan Stanley's stock. Having just been its CEO, Mack would logically still have knowledge of material nonpublic information. Mack told Samberg he had just unloaded a bundle of Morgan Stanley stock.[122] Samberg did not trade on this news, so far as we knew.

5) Samberg was proposing Mack as a director on two boards.[123]

6) They were close friends, e.g., Samberg's secretary said "Mack loves you." On this point, my August 4 email reads in part:

> In July 2001, Samberg's company was splitting apart. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee 'might walk.' A big hit on GE-

[117] See Excel spreadsheet with Mack and his wife's investments in PCM funds. A copy of this document was provided to Committee staff as attachment 11 to Ex. 19 to my August 21, 2006, letter to Senator Shelby.

[118] See my June 27, 2005, email to Kreitman, Hanson and Ribelin; and my July 27, 2005, email with attachments to Kreitman and Berger.

[119] PCM response to SEC inquiry question 5. A copy of this document was provided to Committee staff as Ex. 51 to my August 21, 2006, letter to Senator Shelby.

[120] See the June 20, 2005, string of emails between Hanson and me.

[121] A copy of this document was provided to Committee staff as attachment 11 to Ex. 19 to my August 21, 2006, letter to Senator Shelby.

[122] I am not in possession of this email. However, I know where it can be found at the SEC.

[123] See *Celiant*, *supra*, note 116.

> HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him."[124]

The mere relationship between Mack and Samberg was a sufficient "benefit" to Mack to establish a securities violation if he gave Samberg the Heller tip.[125]

Mack and Samberg Trusted Each Other

On this point, my August 4 email to Hanson and August 24 email to Berger read:

> [Samberg] holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.[126]

There is also the fact that Samberg brought in Mack as PCM's chairman in June 2001 when the insider trading investigation was clearly focused on trading directed by Samberg. My June 3, 2005 email to Hanson read in part:

> John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. ...Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets?[127]

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[124] See my June 27, 2005, email to Kreitman, Hanson and Ribelin; and my August 4, 2005, email to Hanson.

[125] *Dirks v. SEC*, 463 U.S. 646, 664 (1983) ("The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.")

[126] See my August 4, 2005, email to Hanson; my August 24, 2005, email to Berger; my June 27, 2005, email to Kreitman, Hanson and Ribelin; my June 28, 2005, email to Kreitman, Hanson and Ribelin; and my July 27, 2005, email with attachments to Kreitman and Berger.

[127] See my June 3, 2005, email to Ribelin, Foster, Eichner, Conroy, Glasco, Miller, Hanson and Kreitman. This email incorrectly stated that Mack left Morgan Stanley in late July 2001. This point was corrected by my email of June 6, 2005; Mack actually left in March 2001.

Hanson replied twice. In the first, he said: "Mack is another bad guy (in my view)."[128] In the second, Hanson observed:

> They may feel they have some enterprise exposure and want to avoid an indictment of the firm by bringing in an outsider to give the appearance that things are cleaned up (audrey [sic] did this before on the case I wordked [sic]) or they may be bringing him in so they are all peeing out of the same tent so to speak.[129]

Taking Mack's Testimony as Soon as Possible Was Consistent with Standard SEC Practice

In my July 27, 2005, email to Kreitman and Berger, I also noted:

> I also believe Mack's testimony should have been taken promptly for the same reason that staff normally takes early testimony of suspected participants in an insider trading investigation—to pin them down. This is particularly true here because CFSB and Morgan Stanley are still producing e-mails. Further Morgan Stanley will be friendly because Mack is now its CEO. CSFB will be friendly to Mack because Gary Lynch, who is going to Morgan Stanley in a couple of months to join Mack, controls the CSFB production responsive to our subpoena. Further delay allows Mack to concoct a story that is consistent with the information contained in the e-mails. On the other hand, if he did not provide information, that also may become clear. As discussed in my June 28 e-mail to Mark (Exhibit 10), this would allow us to focus on other possible sources for the tip.[130]

Pinning down the suspected tipper or tippee allows the case to proceed in either of two directions: prove the insider trading case or prove the tipper or tippee gave false testimony. For example, Martha Stewart was not convicted of insider trading; she was convicted of lying to federal officers. This principle is taught at Enforcement training for new staff. It is constantly repeated by senior staff. It guided the PCM investigation until Mack became a suspect. This guideline—taking the testimony to pin down the suspect—was turned on its head for the Mack testimony. In effect, my superiors required the case against Mack be established before his testimony could be taken.[131]

How the Mack Investigation Was Halted So He Could Become Morgan Stanley's CEO

As discussed above, the investigation of the GE-Heller matter made significant progress during May and the first half of June 2005. On June 14, Hanson and Kreitman authorized me to present the GE-Heller matter, including Mack's and Samberg's roles as

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[128] See Hanson June 3, 2005, email to me.

[129] See Hanson's email to me also dated June 3, 2005.

[130] See my July 27, 2005, email with attachments to Kreitman and Berger.

[131] Kreitman required proof exist Mack "went over the wall," meaning he had knowledge GE intended to acquire Heller before he could be asked if and when he had such knowledge. See discussion *infra* p 37.

the possible tipper and tippee, to the FBI and a federal prosecutor, which I did with other staff the next day.[132] On June 29, 2005, Hanson gave my 2004-2005 performance a positive evaluation based on my handling of the GE-Heller investigation, stating that I "made contributions of high quality."[133]

But the positive momentum of the GE-Heller investigation had just hit a roadblock. On approximately June 23, 2005, in a face-to-face meeting, Hanson told me that it would be difficult to obtain authorization for the issuance of a subpoena to Mack *because he had powerful political connections* and Kreitman "would have to make the call."[134] Hanson repeated his statement regarding Mack's political connections in a meeting with Kreitman later that same week and again in a meeting between the two of us on August 3. I confirmed Hanson's statements about Mack's "political connections" in my emails of July 27, 2005, to Kreitman and Berger,[135] August 4, 2005, to Hanson[136] and August 24, 2005, to Hanson.[137] By his email of August 24, Hanson admitted telling me about Mack's "political clout" in response to my request to issue a subpoena for Mack's testimony and his records.[138] By his email of August 4, Hanson admitted telling me that Mack's attorneys had "juice."[139]

But another event in late June 2005 tells more directly why my efforts to subpoena Mack would fail. On June 23, three days after I first proposed the Mack subpoena be issued, The Wall Street Journal announced that Morgan Stanley "has weighed reconsidering former Morgan president John Mack as a candidate for [its] chief executive officer."[140] That same day, Eric Dinallo (Dinallo), head of Morgan Stanley's regulatory compliance group, phoned me.[141] Dinallo confirmed that Morgan Stanley was considering Mack for its CEO and, in connection with that possibility, asked if Enforcement was seriously considering Mack as a suspect in the PCM investigation. Dinallo explained that the prospect of such an action against Mack could affect Morgan

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[132] The index to the notebook was provided to Committee staff as Ex. 4 to my August 21, 2006, letter to Senator Shelby. The index also served as an outline for my presentation to Hanson and Kreitman on June 14, 2005, and to the FBI agents and U.S. Attorney on June 15, 2005.

[133] My evaluation of my own work, referred to by the SEC as a "contribution statement" was forwarded to Hanson by my email on June 17, 2005. After receiving my contribution statement, Hanson did his own evaluation of my performance, which was provided to Committee staff as Ex. 38 to my August 21, 2006, letter to Senator Shelby. Then, Hanson forwarded it to the Compensation Committee. The date of Hanson's evaluation and his transmittal date to the Compensation Committee are unknown because the SEC has refused to produce these records. Pursuant to my FOIA request, the SEC produced the "Supervisory Transmittal Form" in which Hanson stated my contributions were of "high quality."

[134] This is my best recollection. However, it is possible this communication occurred as early as June 21. This discussion was memorialized in my email of July 27, 2005, to Kreitman and Berger; my email of August 4, 2005, to Hanson; my email of August 24, 2005, to Berger; as well as in Hanson's email of August 24, 2005, to me.

[135] See my email with attachments of July 27, 2005, to Kreitman and Berger.

[136] See my August 4, 2005, email to Hanson.

[137] See my August 24, 2005, email to Hanson.

[138] *Id.*

[139] See Hanson's August 4, 2005, email to me.

[140] Ann Davis, *Morgan Stanley May Reconsider Mack for CEO*, WALL ST. J., June 23, 2005, at C1.

[141] This phone call could have occurred on June 27, though June 23 is my best recollection of the date.

Stanley's decision whether to rehire him as its CEO. I responded that I could make no statement on the subject, but would inform my supervisors of his inquiry.

Following the conversation, I informed Hanson and Kreitman of Dinallo's question. In my presence, Kreitman called Dinallo and told him that he was following up on Dinallo's call to me. Dinallo repeated the statement he made to me. Following the call, Kreitman stated in my presence that we should tell Morgan Stanley the SEC was considering an action against Mack since that action could adversely affect the value of Morgan Stanley's stock, a publicly held company. But Kreitman said he would first discuss the issue with Associate Director Berger. That same day, Kreitman discussed Dinallo's question with Berger by speaker phone in my presence. Kreitman first informed Berger of the call from Dinallo. Then, the following exchange took place between Kreitman and Berger almost in these words:

Kreitman: I think we will likely file against Mack and...

Berger (cutting in): I don't think we are going to file and nothing should be said to Morgan Stanley.

Following the Kreitman-Berger call, there was an abrupt shift in the way the investigation was handled; that shift related exclusively to Mack. The usual routines and protocols went out the window. The next day, June 24, Hanson met alone with Berger on the evolving Mack controversy. Although Hanson initially invited Ribelin and me to the meeting, Berger told Hanson at the last moment that the meeting would involve only the two of them. Ribelin and I normally had been included in these meetings. We had firsthand knowledge of the testimony and the other evidence; I also had primary responsibility for the investigation.[142] The following Monday, June 27, Hanson and Kreitman also met privately to discuss my request to issue the Mack subpoena.

On June 27, I learned that Mack-Samberg emails, which I had subpoenaed from Morgan Stanley, had been delivered directly to the Director of Enforcement, Linda Thomsen (Thomsen). Neither I nor other staff had heard of this happening before. Indeed, the subpoena explicitly stated that the documents were to be delivered to me. When I picked up the emails from Director Thomsen's office, she also gave me a fax cover letter from Mary Jo White (White), former US Attorney in New York. The fax indicated that White was forwarding the Mack-Samberg emails to Thomsen as a follow up to her conversation with Thomsen on the same subject.[143] I had numerous contacts with other Morgan Stanley counsel, but never with White. It appeared that White had been retained by Morgan Stanley to deal directly with Thomsen about the Mack investigation. It is the usual protocol for a defense counsel to deal with the staff attorney first and then go further up the chain of command if he or she were dissatisfied with a decision by the staff attorney. My dealings with Morgan Stanley attorneys had always been cordial and none had expressed a desire to speak with my supervisors. White simply started at the top.

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[142] See my email with attachments of July 27, 2005, to Kreitman and Berger.
[143] *Id.*

The emails that White had delivered to Thomsen were only one of the two classes of emails I had subpoenaed from Morgan Stanley: email exchanges between Samberg and Mack before Mack left Morgan Stanley in March 2001.[144] These exchanges took place before Morgan Stanley became GE's consultant in May 2001 on the Heller acquisition. Accordingly, no one expected these emails to have even the most subtle clues regarding the possible tip from Mack to Samberg. Rather, this class of emails were sought to provide background information on the Mack-Samberg relationship, e.g., how often they exchanged trading tips, and as a check on whether PCM had produced all Mack-Samberg email exchanges for this time period, which we doubted.[145]

The other class of emails sought, Mack's communications with Morgan Stanley staff after he left, had more relevance to the possible flow of information. Again, no one expected to find a smoking gun in these emails. As discussed below, smoking guns are rarely found in insider trading cases, particularly when the suspected tipper and tippee are highly sophisticated financial professionals.[146] Rather, these emails might identify Morgan Stanley employees with whom Mack was still communicating *after* he left Morgan Stanley. That lead could open a new path to investigate, e.g., whether the employee was on the acquisition team, had a friend on the team, or had any other reason to know about the acquisition. White produced no emails of this class, at least none that Thomsen turned over to me.

When I picked up the emails from Thomsen, she walked out of her office, handed them to me, and made this comment: "they say what they say." I turned the emails over to an intern to review and compare with those produced by PCM; she reported back, as I recall, that there were a few new emails. This was relevant to our growing belief that PCM had withheld or destroyed 2001 Samberg emails. As expected, however, the emails merely provided background on the Samberg-Mack relationship.

In this context, Director Thomsen's comment—"they say what they say"—was troubling. As discussed above, the emails said very little. Had White suggested to Thomsen that these emails somehow demonstrated Mack had not provided the tip to Samberg? Was Thomsen going along with it? Did Thomsen think we were relying on these emails to prove Mack had tipped Samberg? To begin with, our primary theory was the tip had flowed from CSFB to Mack and then to Samberg. Over the next couple of days, as my supervisors continued to block the Mack subpoena, my concern grew. Had Thomsen or Berger directed Kreitman to block the Mack subpoena based on emails White had delivered to Thomsen? If so, why was Thomsen making decisions that could unravel the investigation without a complete briefing?

By email of June 29, 2005, I informed Kreitman that the most senior Enforcement staff had assumed unusual roles in relation to the Mack investigation: (1) Director Thomsen was receiving Mack-Samberg emails responsive to the subpoena I had served

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[144] See my July 19, 2005, email to Kreitman, Hanson, Ribelin, Eichner and Jama.
[145] See *supra* note 92.
[146] Newkirk *infra* p. 41 and note 209.

on Morgan Stanley; and (2) senior staff (who had little knowledge of the investigation) was dealing directly with Morgan Stanley's counsel. My email read:

> I have been informed by Fiona Phillips, who represents Morgan Stanley, that a CD is expected here this afternoon. When I told them [her] that it could be delivered tomorrow, since the mailroom would be closed, she insisted that it be delivered today because "someone here was expecting it." That person is not me. *I also understand that other documents from Morgan Stanley were sent directly to Linda Thompson [sic] and that there have been discussions between senior staff and counsel for Morgan Stanley. As I have told Bob, and stated in my memos, the most logical path of the information is from CSFB to Mack to Samberg* (emphasis added).[147]

Kreitman did not respond to this email.

Director Thomsen had reason to listen when White called her in late June to discuss the possible SEC insider trading investigation of Mack. At that time, Thomsen's job was on the line. As Director of Enforcement, she serves "at the pleasure" of the SEC Chairman. In late June 2005, the SEC was about to change its Chairman.[148] President Bush had nominated Christopher Cox, who was widely perceived to be far more business friendly than his predecessor.[149] The financial media openly speculated that Thomsen could lose her job.[150] This new reality apparently had some effect on Thomsen; she told Newsweek in June 2005 that Enforcement would have to adapt to the new leadership.[151] It was in this environment that White called Thomsen to discuss—and more than likely try to discourage—the insider trading investigation of Mack, the Wall Street titan and "elite" Bush fund raiser. Incidentally, Hanson identified White as one tentacle that Mack could use in exercising his "political clout."[152]

On June 27 and June 28, I sent two emails to Kreitman explaining in detail (1) the evidence indicating Samberg had acted on material nonpublic information in directing the

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[147] See my June 29, 2005, email to Kreitman.

[148] Susan Harrigan, *Mutual Fund Rule Gets Nod; SEC Revote Reaffirms Measure Requiring Directors Have No Ties to Firms Managing Investors' Accounts*, NEWSWEEK, June 30, 2005, at 52 ("To succeed Donaldson, President George W. Bush has appointed Rep. Christopher Cox (R-Calif.), who has been perceived as friendly to business.")

[149] *Id.*

[150] *Departures May Leave a Political Imbalance*, FIN. TIMES, June 29, 2005, Comment at 15 ("Cox, if approved by the Senate, would have to decide whether to retain Linda Chatham Thomsen as SEC enforcement director."); see also: Carrie Johnson, *For Chief, A ChancetTo Shape the SEC; Cox May Choose Division Heads*, WASH. POST, June 7, 2005, at D1 ("Whether Cox retains or replaces her will be watched closely as a clue to his commitment to stringent enforcement.")

[151] Karen Tumulty and Mike Allen, *His Search for a New Groove*, TIME, December 19, 2005, at 38.

[152] By my email of August 24 to Hanson, I confirmed than Hanson had stated "several times that the problem in taking Mack's exam is his political clout, e.g., all the people that Mary Jo White can contact with a phone call." Hanson responded on the same day: "Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony."

trades in GE and Heller stocks[153] and (2) why subpoenas for Mack's testimony and related records were the most logical next steps in the investigation.[154] On June 27, I also prepared and delivered to Kreitman a spreadsheet summarizing Mack's ties to fifteen PCM hedge funds[155] and directed an intern to prepare and deliver another spreadsheet summarizing other key Mack-Samberg contacts and business relationships.[156] These emails and spreadsheets supplemented emails to Hanson earlier in June indicating that Mack was the likely tipper.[157]

On June 28 and 29, I spoke privately with Kreitman regarding the issuance of the Mack subpoenas. Kreitman showed no interest in the facts summarized in the emails and spreadsheets supporting my belief that the Mack subpoena should be issued. Nor would he allow me to summarize the facts in those emails and spreadsheets. He angrily refused to allow the subpoenas to be issued, but did not explain the reasons for his decision. He provided no guidelines under what circumstances he would authorize the issuance of the subpoenas. By email of June 29, I confirmed Kreitman's refusal to allow the Mack subpoena to be issued and also noted his decision would have a significantly adverse impact on the investigation. That email read in part:

> As you know, I have asked to issue a subpoena to CSFB and to take the testimony of John Mack in connection with Samberg's $80 million trades in GE and Heller shortly before the public announcement of the GE's acquisition of Heller. I suggested in my e-mail to you of June 27 in summary fashion why Mack was a logical source of the tip and also suggested in my memo of June 28 that this was the next logical step in this investigation....
>
> Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation....[158]

As stated below, Kreitman did not respond to my June 29 email for almost four weeks. This was out of character for him, as it was his practice to promptly reply to emails from his subordinates. Even more out of character, he never replied to my lengthy emails of June 27 (nine pages) and June 28 (four pages) describing why Mack's testimony should be taken.

I had issued over ninety subpoenas in the course of the PCM investigation. With the exception of the delivery of the Mack-Samberg emails by Morgan Stanley's counsel

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[153] See my June 27, 2005, email to Kreitman, Hanson, and Ribelin.

[154] See my June 28, 2005, email to Kreitman, Hanson and Ribelin.

[155] See Excel spreadsheet with Mack and his wife's investments in PCM funds. A copy of this document was provided to Committee staff as attachment 11 to Ex. 19 to my August 21, 2006, letter to Senator Shelby.

[156] I do not have a copy of this spreadsheet. However, an edited portion of that spreadsheet limited to the known email communications between Mack and Samberg was provided to Committee staff as attachment 12 to Ex. 19 to my August 21, 2006, letter to Senator Shelby.

[157] See my June 6, 2005, email to Hanson and others; and Hanson's June 20, 2005, email to me.

[158] See my June 29, 2005, email to Kreitman.

to Director Thomsen, defense counsel always sent the responsive documents to me in accordance with the explicit instructions in the subpoena. Likewise, I had spoken directly with all defense counsel regarding their clients' compliance with these subpoenas. No controversy had arisen during my discussions with Morgan Stanley's counsel regarding the production of documents pursuant to the Commission subpoenas.

As mentioned above, it was even more unusual that Morgan Stanley brought in a high-powered attorney, Mary Jo White, to discuss a subpoena production with Enforcement's highest official, Director Thomsen. Thomsen and White surely discussed something more important. The likely subject of their call was Morgan Stanley's dilemma; Mack could not step in as Morgan Stanley's new CEO if he brought with him the risk of an SEC lawsuit for insider trading. Morgan Stanley's chief compliance officer called me a day or two before to discuss the same subject. No one knows what White and Thomsen discussed except them. But two events the next week give a strong clue: Kreitman barred the service of any subpoena on Mack, and, consequently, Mack was able to return to Morgan Stanley as its CEO.

The evidence indicated Kreitman had executed the decisions, but had not made them. His handling of the Mack controversy was out of character for him, e.g., giving Mack favored treatment, directing me to seek a criminal investigation and then blocking the issuance of an administrative subpoena, refusing to review my emails detailing the reasons Mack's testimony was necessary, failing to respond to multiple emails, and doing much of this with anger. It was obvious to me that he was under pressure from above. Berger's handling of the Dinallo question suggested that the pressure was coming at least from his level. The unprecedented delivery of the Mack-Samberg emails to Director Thomsen and her discussion with Mary Jo White suggest Thomsen had applied the pressure. And if Thomsen had applied the pressure, did it originate with her or was it merely passing through her from a higher level within the SEC or outside the SEC from Mack's or Morgan Stanley's "powerful political contacts"?

On June 30, one week after Dinallo's call, Morgan Stanley hired Mack as its CEO. Morgan Stanley's concern that Mack was under investigation, as expressed by Dinallo to Kreitman and me one week earlier, had been assuaged. The only way Mack could be insulated from an SEC investigation was if senior SEC officials had decided that he would not be investigated. *The only way Morgan Stanley could be comfortable that Mack would not be investigated by the SEC is if a senior SEC official had given this assurance.*

On the same morning Mack returned as Morgan Stanley's CEO, June 30, 2005, I tendered my resignation, effective September 30, 2005. I had returned to the practice of law in September 2004 to perform public service with the SEC. I believed, and still do, that my supervisors' decision blocking the Mack subpoena was done as a favor for Mack and Morgan Stanley and, as such, corrupted the SEC's mission. Trying to get my supervisors to adhere to the SEC's mission was not why I had come to the SEC. More to the point, I could not carry out my duties as a federal officer in the PCM investigation and yet accept the decision of my supervisors to give Mack favored treatment.

Over the next four weeks, other SEC staff encouraged me to withdraw my resignation and try to change the course of the PCM investigation. One colleague suggested that my departure guaranteed the GE-Heller investigation would end. Additionally, over the next four weeks, I continued to find more evidence suggesting that Mack was the tipper. By late July, I decided to withdraw my resignation. I would challenge my supervisors' decision giving Mack favored treatment at ever higher levels of the SEC until it was reversed.[159] To that end, on July 21 or July 22, I met with Berger and told him that Hanson had informed me the Mack subpoena had been blocked because of Mack's powerful political connections. On July 27, I sent Berger two emails. One told him I was withdrawing my resignation.[160] The other informed him why I believed Hanson had blocked the Mack subpoena: Mack's powerful political connections.[161]

The apparent favor from senior Enforcement officials to Mack and Morgan Stanley raises another troubling question: Did any of the senior officials who blocked the Mack testimony receive anything in return? That question shifts the focus to former Associate Director Berger. The most obvious *internal* intervention in the Mack investigation came from Berger. He was the point person who cut off Kreitman in mid-sentence to say the Mack investigation was going nowhere. Kreitman then reversed his support for the Mack investigation. The most obvious *external* intervention in stopping the Mack investigation came from Mary Jo White of Debevoise & Plimpton (D&B), attorneys for Morgan Stanley. In bypassing SEC protocol, she went directly to Director Thomsen, who, to the best of my knowledge, had never been briefed on the GE-Heller investigation and Mack's possible role as the tipper.

In May 2006, White announced Berger would start in June with D&P and work on securities cases, enforcement and white-collar criminal defense matters. She said Berger's wealth of experience at the SEC "will be a tremendous asset to our clients."[162] Some obvious questions must be asked about Berger's courtship with D&P. Had Berger stopped the investigation and terminated my employment to curry favor with D&B? Did May Jo White participate in recruiting Berger to D&B? When were the first discussions between D&B and Berger about his personal plans? Did Berger recuse himself from the PCM investigation after he began discussions with D&B about his personal plans? Was Berger a "tremendous asset" to a D&P client before he left the SEC?

My Supervisors Gave False and Ever-Changing Reasons for Blocking the Mack Subpoena

After senior Enforcement officials decided to block the Mack subpoena, they still had to communicate their decision to lower staff. And this would raise a sticky question: why no subpoena for Mack? One option was to tell staff the truth. That assignment would likely have fallen on Kreitman. His email would have read something like this: "Director

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[159] Federal employees are required to "disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. 2635.101.

[160] I spoke with Berger that same day and he accepted the withdrawal of my resignation. See my July 27, 2005, email to Berger.

[161] See my July 27, 2005, email with attachments to Kreitman and Berger.

[162] *SEC Associate Enforcement Director Stepping Down*, DOW JONES NEWS SERVICE, May 18, 2006.

Thomsen and Associate Director Berger have made a final decision: John Mack will not be subpoenaed for reasons they do not wish to share. Anyone who presses for those reasons will be fired." Enforcement officials wisely rejected the truth option. They did, however, come up with something similar: give a reason that sounds like the truth. This broadened the options.

Does Mack Have a Motive?

Kreitman came up with the first one on June 27: did Mack profit from Samberg's trades in GE and Heller? I said yes, explaining Samberg had allocated profits from the GE-Heller trading to at least one of the hedge funds in which Mack had invested.[163] I also told Kreitman that Samberg had returned Mack's favor, assuming Mack had tipped Samberg, with numerous favors of his own to Mack.[164] Two days later, I sent Kreitman an email describing Samberg's favors to Mack.[165] Those favors were also addressed in my emails of July 27 and August 4.[166]

The issue of motive had never been raised by any of my supervisors in the PCM investigation as a *reason not to issue a subpoena*. Further, under established precedent, the friendship between Mack and Samberg was alone sufficient to establish illegal insider trading if Mack had tipped Samberg.[167] The hunt had begun: senior Enforcement officials were looking for a reason—legitimate or not—to block the Mack subpoena.

We Need More Specificity to Approve the Mack Subpoena

Four weeks passed before Kreitman would raise another objection to Mack's testimony. By his July 25 email, Kreitman said he wanted more "specificity" before he would approve the subpoena for Mack.[168] His email made no sense. First, Kreitman usually responded within hours to emails from his subordinate staff. His July 25 email was a reply to my email of June 29, *almost four weeks earlier*. Second, Kreitman's email ignored the "specificity" set forth in the lengthy emails and spreadsheets he received on June 27 and June 28.[169]

I replied to Kreitman and also to Berger on July 27 in an eight-page email with fifteen attached exhibits. The exhibits were emails and spreadsheets which I had previously provided to Hanson or Kreitman.[170] Referencing these exhibits, the letter addressed every contention in Kreitman's July 25 email. My email first addressed the

[163] See my June 27, 2005, email to Kreitman, Hanson and Ribelin.

[164] The favors Samberg did for Mack are described above at pp, 21-22.

[165] See my June 29, 2005, email to Kreitman.

[166] See my August 4, 2005, email to Hanson; my August 24, 2005, email to Berger; and my July 27, 2005 email with attachments to Kreitman and Berger.

[167] See *supra* note 125.

[168] See my July 27, 2005 email with attachments to Kreitman and Berger.

[169] *Id.*

[170] *Id.* The spreadsheet was an edited version of a portion of the spreadsheet previously provided to Kreitman. I do not have the spreadsheet itself. The edited spreadsheet was provided to Committee staff as attachment 12 to Exhibit 17 to my August 21, 2006, letter to Senator Shelby.

four-week delay in Kreitman's response. I suggested that Kreitman's email had been prompted by my meeting with Associate Director Berger a few days earlier.

> My July 27 email began:
>
> This replies to Mark's e-mail of July 25, which in turn replied to mine of June 28 (attachment 13).[171] I wrote and sent my e-mail immediately after a heated discussion with Mark on June 28, memorializing what had transpired. I do not understand why it would take four weeks to respond. I am also copying Paul because the timing of Mark's e-mail suggests it was triggered by my conversation with Paul on the same points late last week.

I told Berger during our meeting the prior week that Hanson had blocked the issuance of subpoenas for Mack's testimony and key documents because Mack had powerful political connections.

My July 27 email went on to point out that a suspected violator of the federal securities laws (Mack) was getting special treatment because of his powerful political connections and that "treating Mack differently is [not] consistent with the Commission's mission, at least as I understand it...." The email reads in part as follows:

> I had different and more troubling input why it was difficult to move ahead with the second CSFB subpoena and the Mack testimony. I sent two e-mails to Bob during the week of June 20 (see attachments 3 and 8) proposing that we proceed with the Mack testimony and broaden the CSFB subpoena. When I did not hear back from Bob, I spoke with him directly about these proposals. Bob told me 1) that these decisions were for Mark to make and 2) *it would be an uphill battle because Mack had powerful political connections. Bob also mentioned this concern during a meeting with Mark and me* (emphasis added). Bob's comment about Mack's political influence became more real when I learned on June 27 that documents I had subpoenaed from Morgan Stanley were faxed by Mary Jo White (who had never represented anyone in the investigation) directly to Linda Thompson (see attachment 15), before Morgan Stanley produced them in the investigation. On the preceding Friday, June 24, Bob also met privately with Paul about the investigation I was handling. Likewise, Mark and Bob did not invite me to participate in the meeting on June 27 when they discussed Mack's possible testimony. This combination of events suggests to me that the issue whether Mack's testimony would be taken was being handled differently than the same issue for other witnesses in this investigation and different from the same issue in other investigations. Further, I do not believe that treating Mack differently is consistent with the Commission's mission, at least as I understand it.[172]

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[171] Attachment 13 refers to my email of June 29, 2005, to Kreitman.

[172] See my July 27, 2005, email with attachments to Berger and Kreitman.

In sum, I informed Berger on two occasions in less than one week that Hanson had blocked the Mack subpoena because of his powerful political connections. Blocking Mack's testimony for this reason violated multiple provisions of the Code of Federal Regulations which governs the operations of the SEC.[173] Yet, Berger took no action whatsoever. He apparently did not even speak with Hanson because, exactly one week after my July 27 email, Hanson repeated the comments about Mack's political clout, which he first made on June 23. But issue is specificity?

We Need another Memo Before We Can Decide to Authorize Mack Subpoena

At a face-to-face meeting with Hanson on August 3, I again questioned the decision to block the Mack subpoena because of his political influence. At that meeting, Hanson reiterated his earlier position: it would be very difficult to take Mack's testimony because of his political influence. By my email of August 4, I confirmed further details of the exchange with Hanson on August 3:

> Second, I told you that the decision not to take Mack's testimony because of his powerful political connections was the event that triggered my decision [to leave the Commission] ...We then discussed at some length what standard had to be met to take Mack's testimony. You told me that Mack was "an industry captain," that he had powerful contacts, that Mary Jo White, Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call Linda about the examination. I told you I did not believe we should set a higher standard for a political captain than anyone else.[174]

In another email on August 4, I confirmed and continued the discussion from the night before:

> Bob:
>
> I mentioned last night that Ferdinand Pecora was chief counsel for the Senate Committee that drafted the 1933 and 1934 Acts, including the key operative language of Section 10(b)...
>
> When the SEC declines to question "industry captains," when an investigation suggests it is the next logical step, we are granting them a pass to play the trading game by their own rules. We do the same when we set artificially high barriers to question them that do not exist for others, e.g., don't question them about going over the wall until we proved they have already made the trip.
>
> I don't think Pecora was suggesting that regulatory scrutiny be delayed until we have another market collapse. I do not think he would have

[173] *Supra* note 4.

[174] See my August 4, 2005, email to Hanson at 9:48 am.

> delayed a heartbeat before taking John Mack's testimony on the record in this matter. Mack had multiple motives, Samberg's trust, contact with Samberg at the key moment, and two possible sources for the tip. He should be asked the obvious questions.[175]

In his next email, Hanson bypassed my characterization of his comments about Mack's political influence, but he did not deny them. He only admitted saying: "Mack's counsel will have 'juice' as I described last night—meaning that they may reach out to Paul and Linda (and possibly others)."[176]

Several weeks later, Hanson and I had another email exchange on "Mack's political clout." Here are our email exchanges discussing Hanson's comments to me:

Aguirre: "First, before and after the Mack decision, you have told several times that the problem in taking Mack's exam is his political clout, e.g., all the people that Mary Jo White can contact with a phone call."[177]

Hanson: "Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony."[178]

Aguirre: "Bob, this is spin. You told me it would be tough to take Mack's testimony because he has political clout. An artificially high barrier has been set for his exam. I do not think this is proper. Doing so clashes with the SEC's mission. It also stops me from doing my job as a federal officer."[179]

The "reason" Hanson gave in his email for telling me about "Mack's political clout"—"to keep Paul and possibly Linda in the loop on the testimony"—makes no sense. When Hanson spoke about Mack's political influence during our meeting on August 3, as confirmed by my August 4 email, both Paul and Linda had been making decisions relating to Mack's testimony for six weeks. They were both clearly "in the loop."[180] Further, if my supervisors withdrew their objection to the Mack subpoena, there would be plenty of time to inform both Thomsen and Berger before the subpoena hit the fax machine.

The August 4 email exchange resulted in Hanson directing me to prepare yet another memorandum explaining why Mack's testimony should be taken. Consequently I prepared and sent another lengthy email to Hanson and later to Berger explaining why the Mack testimony was the next logical step.[181]

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[175] See my August 4, 2005 email to Hanson at 7:25 am.
[176] *Supra*, note 174.
[177] See my August 24, 2005, email to Hanson.
[178] *Id.*
[179] *Id.*
[180] See discussion *supra* pp. 26.
[181] See my August 4, 2005, email to Hanson and my August 24, 2005, email to Berger.

We'll Check Your Facts and Then Decide whether to Authorize Mack's Testimony

After Hanson repeated his comments on August 3 about Mack's political influence, it was clear Berger had done nothing. I therefore decided to inform Director Thomsen of Mack's preferential treatment, and, if she failed to act, to inform the Commissioners. But first a little background is necessary to place in context my comments to Thomsen.

As discussed above, Foster had worked on the PCM investigation since I contacted him in October, just after his presentation to incoming staff how to conduct an insider trading investigation. He retired from the SEC on June 30, 2005. At Foster's going away party on July 11, I was present when Foster told Thomsen that the PCM investigation was the most important matter he had worked on during his 30 years with Enforcement. Later that evening, Foster also suggested to me that I speak directly with Thomsen regarding the investigation.

Consequently, on August 4, 2005, I sent the following email to Thomsen:

> Subject: Hilton's comment to you
>
> Do you have an open door policy?
> If so, do you recall Hilton Foster's comment to you about the most important case he handled in his 30 years with the Commission? He wanted me to talk to you about it. It was nearly killed 5 months ago[182] and is now moving in circles.
>
> It could change the financial markets--make them a little more hospital [hospitable] for investors, small or big, who do their home work rather than buy information with favors. [183]

Immediately after I sent the above email to Director Thomsen, Hanson took a more flexible position on the Mack subpoenas. His new position was this: he and I would discuss whether to issue the Mack subpoenas in September after we both returned from vacation; the facts in my latest email regarding Mack would be "nailed down."[184] Based on Hanson's new flexibility, I postponed the meeting with Thomsen. My email to the Thomsen read in part:

> The day following my e-mail to you, my Branch Chief said he would like to discuss in September, when all are back from vacation, the

[182] This refers to a decision by Kreitman in early February 2005, less than a month after staff had obtained subpoena power and before any subpoenas had been issued. Kreitman directed that the PCM investigation be narrowed to two or three matters. Kreitman had expressed his approval a few days before when the investigation was increased to include seventeen referrals. Kreitman later withdrew the directive in March. Kreitman implied the directive had come from Berger. It came approximately two weeks after an influential attorney representing PCM met with Enforcement Director Steven Cutler.

[183] See my August 4, 2005, email to Thomsen.

[184] See Hanson's August 5, 2005, email to me. The email string is included.

> specific concern that prompted my e-mail to you. I therefore believe it makes more sense to delay discussing this matter with you until September to see if it works itself out. [185]

Must Show that Mack Went over the Wall

But Hanson's idea to check facts would never be implemented. Instead, two weeks later, Kreitman tossed out a new theory to block the Mack subpoena: No subpoena would be issued without proof Mack had been "brought over the wall."[186]

The phrase has meaning in the financial industry lexicon. It applies to someone in a securities firm who is "brought over the wall" restricting access to non-public, material information, sometimes referred to as a Chinese wall. For example, those working on an acquisition might ask an analyst to explain an esoteric point about a product the acquired company manufactures. In this way, the analyst has been "brought over the wall." He has learned material nonpublic information, i.e., that the acquisition is pending.

Kreitman had never raised this barrier for any other suspected tipper in the PCM investigation, including those, like Mack, who were suspected of tipping a PCM portfolio manager of a pending acquisition. I could find no one at the SEC who had ever heard of this requirement as a precondition to the issuance of a subpoena. No federal court case or SEC administrative case ever held that the government had to prove that a suspected tipper "was brought over the wall" before a judgment could be entered against him or her for insider trading.

Kreitman's "over the wall" requirement set a higher standard for issuing an SEC administrative subpoena than an appellate court had set for affirming a criminal conviction of insider trading. The "brought over the wall" requirement meant I had to prove that Mack knew about the pending acquisition and exactly how he had learned about it. The First Circuit set a lower standard—"opportunity" or "access" to material, nonpublic information—in affirming an insider trading conviction in *United States v. Larrabee*, 240 F.3d 18, 21 (1st Cir. 2001) with these words:

> The defendant argues that proof of "opportunity" or "access" to material, nonpublic information is not the same as proving actual possession. That is correct, but does not carry the day. While the defendant is correct that opportunity alone does not constitute proof of possession, opportunity in combination with circumstantial evidence of a well-timed and well-orchestrated sequence of events, culminating with successful stock trades, *creates a compelling inference of possession by the tipper* (emphasis added). [187]

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[185] See my August 10, 2005, email to Thomsen.
[186] See my August 17, 2005, email to Hanson and Kreitman.
[187] *United States v. Larrabee*, 240 F.3d 18, 21 (1st Cir. 2001).

Kreitman's "over the wall" obstacle was a Catch-22 that would have won praise from Joseph Heller. Stripped to its essence, Kreitman was saying this: before I could ask Mack if he knew about the pending Heller acquisition, I had to independently prove Mack already knew about it. That issue—whether Mack knew about the Heller acquisition—was the primary factual issue in the investigation. If Mack knew about the Heller acquisition, the case came together. He would have called Samberg on June 29 *with knowledge*. It would explain why Samberg began the next trading day to accumulate more Heller stock than anyone else in the nation and wanted to buy even more. It would explain why he shorted GE the same way. All the other elements of the tipper's profile would support a finding that Mack was in fact the tipper.[188]

However, Mack's knowledge of the tip would normally be proved by circumstantial evidence.[189] The first step would be to subpoena him and his records, e.g., emails, personal calendar and phone records. But that was where the Kreitman catch-22 fit in. No subpoena could be issued unless *other* evidence proved Mack *already* knew about the Heller acquisition. That was a tall order. The records maintained by CS were in Switzerland, beyond the reach of SEC subpoenas.[190] The only other records, if they existed, were under the control of Mack's close ally, Gary Lynch, General Counsel of CSFB, who would soon join Mack at Morgan Stanley for a $13 million pay package.[191] Lynch's subordinate, another CSFB attorney, believed CSFB had no records relating to Mack's meetings with CSFB's CFO in late June and the second week of July. *Kreitman's Catch-22 was also a checkmate.*

When I explained to Kreitman the "over the wall" concept had no application to Mack's situation, Kreitman seemed to drop the issue.[192] Kreitman offered no further excuse why Mack's testimony should not be taken before he fired me. However, in late August, Hanson picked up the "over the wall" theme again.

"Everyone Feels We Will Take Mack's Testimony at Some Point"

By August 24, Hanson had returned from vacation and was backing away from his earlier decision to reopen the question of Mack's testimony.[193] He did, however, concede: "I believe that everyone feels we will take Mack's testimony at some point-- the question is when."[194] The testimony was not taken until August 1, 2006, and then only after the matter had become public and two key statutes of limitations had expired.[195]

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[188] *Id.*

[189] See *infra* p. 41.

[190] See my August 17, 2005, email to Kreitman and Hanson.

[191] See my July 27, 2005, email with attachments to Kreitman and Berger; and my July 19, 2005, email to Kreitman, Hanson, Ribelin, Eichner and Jama.

[192] *Id.* I could find no one in Enforcement that had ever heard of the theory that the "brought over the wall" concept had any application to the issuance of a subpoena in an insider trading case.

[193] See my August 24, 2005 email to Hanson.

[194] *Id.*

[195] See *infra* p.44.

Hanson and I never met to discuss Mack's testimony, as he suggested on August 5. Hanson left for vacation that day. When he returned on August 22, I was on vacation, scheduled to return on September 6. On September 1, 2005, Kreitman and Hanson called me in California to say my employment would terminate the next day or I could resign. On September 1, Thomsen sent the termination notice, initialed by Berger. On September 2, I sent a letter to each Commissioner informing them of the favored treatment senior Enforcement staff had given Mack.[196]

The evidence suggests that Hanson's new flexibility on August 5 was engineered to stop my disclosures to higher and higher levels of the SEC until Enforcement officials could figure how to camouflage their decision to fire me. Contrary to Hanson's statement, the facts indicating Mack tipped PCM were never vetted. Neither Hanson, nor Kreitman, nor Berger ever responded to my August 4 email, which again detailed the reasons to take Mack's testimony. By the second half of August, both Kreitman and Hanson had reverted back to a hard line on the Mack subpoenas.[197] Consequently, I decided to take the propriety of Mack's special treatment beyond the SEC. On August 29, three days before I was fired, I contacted the Disclosure Unit of the Office of Special Counsel to discuss the filing of a complaint arising out of the PCM investigation.[198]

My Evaluations Were All Positive Until I Questioned Mack's Favored Treatment.

The completed Form 50-B (Personnel Action) records the SEC's decision on August 21, 2005, to raise my merit rating (pay scale) two-steps based on my performance.[199] Director Thomsen's notice of September 1 terminated my employment eleven days later. In between these dates, I was on vacation. The obvious question: How did my performance warrant a two-step pay increase, yet also require the SEC to fire me? The SEC has offered no explanation. To the contrary, it has done its best to obscure those facts. As discussed next, I believe this mystery is solved with two words: John Mack.

I started work with the SEC on September 7, 2004. On June 1, 2005, Branch Chief Hanson and Assistant Director Kreitman did my face-to-face 2004-2005 performance evaluation. Kreitman completed SEC Form 2494 regarding my "performance assessment" in relation to four categories of "Critical Elements and Acceptable Standards."[200] Kreitman had the option of checking one of two boxes ("Acceptable" or "Unacceptable") for each of the four categories: (1) "Knowledge of Field or Occupation," (2) "Planning and Organizing Work," (3) "Execution of Duties," and (4) "Communications." He checked "acceptable" for each category.[201]

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[196] See my September 2, 2005, fax to Chairman Cox.

[197] See my August 4, 2005, email to Hanson; my August 24, 2005, email to Berger; and my August 17, 2005, email to Kreitman and Hanson.

[198] I discussed with Office of Special Counsel attorney Mathew Glover whether nonpublic documents relating to an ongoing SEC investigation could be filed with a whistleblower complaint.

[199] See my merit pay increase, which was provided to Committee staff as Exhibit 35 to my letter of August 21, 2006, to Senator Shelby.

[200] A copy of the SEC Form 2494 approving the two-step merit rating increase was provided to Committee staff as Exhibit 36 to my letter of August 21, 2006, to Senator Shelby.

[201] *Id.*

Since my performance was acceptable in each category, I qualified for a merit step increase.[202] On June 17, 2005, I submitted my "contribution statement," a self-evaluation describing my performance, to Hanson, thereby initiating the merit review process.[203] On June 29, 2005, Hanson sent his evaluation of my 2004-2005 performance to the compensation committee. In the transmittal form, stated that I "made contributions of high quality."[204] His narrative evaluation of my performance read:

> I supervised Gary Aguirre from January 18, 2005 through the end of the rating period. As shown on his contribution statement, Gary worked extremely hard on one investigation during his time with the group, a significant matter involving the trading by Pequot Capital, one of the nation's largest hedge funds.
>
> Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance, Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has gone the extra mile, and then some.
>
> Gary can work on presenting information in a clearer and more concise manner to enhance the effectiveness of his communications both to those he reports to and those he works with.[205]

But there is more—an unofficial evaluation of my performance by my immediate supervisors. On June 14, 2005, the day before my meeting with the US Attorney, Kreitman instructed me to review with him and Hanson the evidence that I had collected and intended to present to the US Attorney and the FBI the next day. Late on June 14, I spent approximately one hour with Hanson and Kreitman going over that evidence and answering their questions. The presentation focused on PCM's trading in GE and Heller over the thirty days prior to the public announcement of GE's intention to acquire Heller. Specifically, I reviewed the evidence indicating Mack and Samberg were the tipper and tippee respectively.[206] I also discussed the Samberg-Zilkha emails, which I had just found, and the possibility that Zilkha might be willing to cooperate with the investigation. When I finished his presentation, Kreitman explained that he sometimes gave unofficial

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[202] In November 2004, Cain explained to me that an "acceptable" performance was a precondition to eligibility for a merit step increase.

[203] See email of June 17, 2005, to Hanson. It includes my "contribution statement."

[204] *Id.* Pursuant to my FOIA request, the SEC produced the "Supervisory Transmittal Form" in which Hanson stated my contributions were of "high quality." I assumed the SEC produced this document in response to the letter of Senator Specter and Senator Grassley dated August 2, 2006.

[205] A copy of Hanson's undated evaluation of my work was provided to Committee staff as Ex. 38 to my letter of August 21, 2006, to Senator Shelby.

[206] The presentation followed the order of the evidence collected in a three-ring binder, which has been provided to Committee staff.

awards to his subordinates for excellent work and there were three levels of these awards: all photos of the fictional attorney Perry Mason. Kreitman also stated he was unsure whether he had ever given the highest of these awards to any staff member before. He then presented me with his highest award—an eight by ten inch image of Perry Mason.[207] Simultaneously, Kreitman and Hanson congratulated me for the development of the PCM investigation through that date, June 14, 2005.

For some reason, the SEC has tenaciously fought to keep me from getting the remaining records relating to my merit pay increase and termination. I first tried to get them informally. When that failed, I submitted a request to the SEC pursuant to FOIA and the Privacy Act for those records. When that failed, I filed a FOIA lawsuit. Since then, the SEC has produced Hanson's transmittal form, dated June 29, 2005, stating that I "made contributions of high quality."

There are two significant gaps in the records the SEC has thus far produced. The first covers the period from June 29, 2006, through August 18, 2006. During this period, Director Thomsen, Associate Director Berger, Assistant Director Kreitman, and the compensation committee must have approved my merit rating increase. Yet, the SEC refuses to produce any records evidencing these steps. Second, the SEC has produced nothing that would explain why it approved my two-step merit rating increase on August 21, 2006, and then fired me eleven days later. A motion to obtain these records in the FOIA case has been set for early 2007.

The Impact of Blocking the Mack Subpoenas on the GE-Heller Investigation

There is wide agreement that insider trading cases are difficult to prove. Former Associate Director Thomas Newkirk, who speaks from experience,[208] explains: "Direct evidence of insider trading is rare. There are no smoking guns or physical evidence that can be scientifically linked to a perpetrator. Unless the insider trader confesses his knowledge in some admissible form, evidence is almost entirely circumstantial."[209]

The process of establishing an insider trading case by circumstantial evidence is tedious. Newkirk explains:

> The investigation of the case and the proof presented to the fact-finder is a matter of putting together pieces of a puzzle. It requires examining inherently innocuous events – meetings in restaurants (as in the Dutch case), telephone calls, relationships between people, trading patterns – and

[207] A copy of this award has been provided to Committee staff as Exhibit 41 to my August 21, 2006, letter to Senator Shelby.

[208] Newkirk's background insider trading cases may be found conducting a word search with his name and the phrase "insider trading" in two Lexis sources: Federal Cases Combined and SEC Decisions, Orders & Releases

[209] Thomas C. Newkirk, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Insider Trading–A U.S. Perspective,* Speech at the 16th International Symposium on Economic Crime Jesus College, Cambridge, England; available at http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm.

> drawing reasonable inferences based on their timing and surrounding circumstances to lead to the conclusion that the defendant bought or sold stock with the benefit of inside information wrongfully obtained.[210]

The Court in *Larrabee* also explained how circumstantial evidence may come together to prove insider trading. The Court summarized the factors that supported the jury's verdict:

> We examine [a] myriad factors, including (1) access to information; (2) relationship between the tipper and the tippee; (3) timing of contact between the tipper and the tippee; (4) timing of the trades; (5) pattern of the trades; and (6) attempts to conceal either the trades or the relationship between the tipper and the tippee. The evidence presented at trial, when pieced together, painted a picture which allowed the jury to conclude beyond a reasonable doubt that Larrabee possessed material, nonpublic information about the Bank of Boston-BayBanks merger.[211]

The process of collecting that circumstantial evidence was going well in the GE-Heller investigation by late June 2005. Growing evidence indicated that Samberg had likely acted on an illegal tip in making his $80 million bet that GE would acquire Heller. The evidence also defined the profile of the likely tipper, which Mack nicely fit. The elements of that profile bear an almost one-to-one relationship with the factors set out in *Larrabee* above for establishing an insider trading case. But there is one significant difference: *Larrabee* was affirming a jury trial verdict in a criminal case; I was asking my superiors to withdraw their objection to an administrative subpoena.

In terms of time, the investigation was in its infancy. The informal investigation was not underway until the fall of 2004. The Commission did not issue its formal order until January 2005. The first subpoenas were issued in February 2005. The GE-Heller investigation began to take shape in May 2005. Even though the formal investigation was only a few months old, Hanson and Kreitman authorized me on June 14 to present the GE-Heller matter, including Mack and Samberg's possible roles as tipper and tippee, to the FBI and a federal prosecutor the next day. Two weeks later, the FBI opened its complementary investigation. In short, the GE-Heller investigation was rapidly advancing, but it would take time to build the circumstantial evidence necessary to file an insider trading case.[212]

At this point, the case against both Samberg and Mack had been developed almost exclusively from PCM records and Samberg's testimony. But this was only half the critical records and testimony needed to complete the investigation. The case against the

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[210] *Id.*

[211] *United States v. Larrabee*, 240 F.3d at 21-22.

[212] Hanson understood this well. After Mack surfaced as the possible tipper, Hanson gave me *The Prosecutors*, by James Stewart, and asked that I read one chapter—*Insider Trading at Morgan Stanley*—which describes the four-year process it took to successfully build a case against Morgan Stanley investment bankers for insider trading. This chapter began with the tipper and tippee meeting at The Harvard Club where the tip was passed during a fake chess game used as a cover.

tipper and tippee is logically developed from evidence obtained from both. By late June 2005, it was time to obtain the records and testimony from Mack. Instead of taking this step, senior Enforcement officials blocked the subpoena for Mack's testimony and records. Once again, insider trading cases are difficult to prove under the best of circumstances. In this case, the investigation involved two of the most sophisticated investment professionals. In barring the investigation of Mack, the SEC blocked the investigation of an insider trading case against Samberg as well.

Another Charade: the SEC Reopens the IG's Investigation And Takes Mack's Testimony

Since July 2005, the SEC has used one charade after another to cover up the fact that senior Enforcement officials gave favored treatment to Mack. After Mack returned as Morgan Stanley's CEO on June 30, 2005, my supervisors were left with the messy problem how to block the Mack subpoena in the face of compelling and growing evidence that it should be issued. This was solved by the first charade which could be called "something is missing." It went like this.

Kreitman: You cannot take Mack's testimony unless he had a motive.
Aguirre: Mack had multiple motives.
Kreitman: Well then, I need greater specificity.
Aguirre: I provided that before, but here it is *again*.
Kreitman: Hmmm, well then, you have to show Mack was "brought over the wall."
Aguirre: There was no wall.
Hanson: OK, then we need another memo why Mack's testimony should be taken.
Aguirre: Fine, here's another one.
Hanson: Thanks, we'll vet your facts and then decide whether to subpoena Mack.
Aguirre: Sounds good to me.
Kreitman: You're fired.

Then, new players joined the ensemble: Chairman Cox and his Inspector General (IG). Faced with allegations that senior Enforcement staff gave Mack favored treatment and then tampered with my personnel records,[213] Chairman Cox called in his IG. The IG promptly asked each of those charged if the allegations were true. All said no. Given that unanimity, there was no point in asking me if I had any evidence to back up the charges. Chairman Cox agreed and the investigation was over. The SEC gave its report to Congress: there was nothing to the allegations.

The SEC was then forced to do an encore. This one could be called: "We promise to do it right this time." It features the same players from past performances: Chairman Cox, his IG, the IG attorneys, and the senior Enforcement attorneys who blocked the subpoena in 2005. The IG attorneys who did the first investigation, best called a whitewash, now promised to broaden the investigation to include some evidence. The

[213] See my October 11, 2005, letter to Chairman Cox.

senior Enforcement attorneys who pretended no grounds existed to take Mack's testimony would next pretend to take Mack's testimony.

One key departure from standard SEC practice was the *timing* of Mack's testimony. The SEC usually takes testimony in an insider trading *before the statute of limitations has expired.* The SEC employed a different strategy with Mack. It allowed the primary statutes of limitation to expire before Enforcement attorneys asked Mack a single question. Mack's testimony was taken on August 1, 2006. The five-year statute of limitations for any criminal charges expired on July 27, 2006.[214] Hence, the testimony was taken four days after the limitations period expired.

Likewise, the limitations period also expired on July 27, 2006, for any case under section 21A of the Securities and Exchange Act of 1934 (Civil Penalties for Insider Trading), the most potent weapon in the SEC arsenal for pursuing those who give or trade on material nonpublic information.[215] That left the SEC with only equitable remedies against Mack and Samberg, i.e., injunctive relief. However, equitable relief is also subject to equitable defenses,[216] including delay in filing the case.[217] It was for this reason that the investigation in 2004 only included SRO referrals involving PCM that were approximately three years old or less. In September 2004, Assistant Director Grime gave me this specific guidance on how far back to go: "Typically I would not go back much further than 3-4 years for transactions given the 5 years SOL for penalties."[218]

Kreitman and Hanson did not merely overlook the statute of limitations; they knowingly allowed it to expire. In August *2005*, I warned both that we faced a problem completing the investigation of PCM's trading in GE-Heller before the statute of limitations expired:

> Assuming we schedule Samberg's testimony a week after Dartley's, which tactically makes the most sense, the five year Statute of Limitations for 10b will begin to expire in eight months and will fully expire in nine...

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[214] *U.S. v. O'Hagan*, 139 F.3d 641 (8th Cir. 1998) ("The proper limitations period for the criminal securities fraud counts brought against O'Hagan is the five-year statute of limitations set forth in 18 U.S.C. § 3282").

[215] Civil penalties for insider trading (15 U.S.C. § 78u-1). This statute allows treble damages for insider trading. Its five year statute of limitations also expired on July 27, 2006.

[216] *SEC v. Egan*, 856 F. Supp. 398, 401 (ND Ill. 1992) ("If Northern is to be deprived of its money (something that this Court does not now decide), that will take place only after it has had a meaningful opportunity to be heard on the merits and to present any defenses- including equitable defenses --to disgorgement.")

[217] *SEC v. Willis*, 777 F. Supp. 1165, 1173 (SDNY 1991) ("If the remoteness in time is substantial and there have been no intervening violations, it is highly improbable that a court, in the exercise of its discretion, would grant injunctive relief." Quoting from A. Jacobs, 5C Litigation and Practice under Rule 10b-5 § 235.01, at 10-5 (2nd rev. ed. 1991)").

[218] See Grime's September 17, 2004, email to me.

> We have miles to go before we could file a 10b action against Samberg and the investigation on these examinations and other aspects has slowed to a snail's pace.[219]

Conclusion

There were two forces on a collision course in late June of 2005. Running one way on the track, the PCM investigation was gathering momentum. The evidence was growing stronger that Samberg had relied on an illegal tip when he bet $80 million in July 2001 that GE would acquire Heller. The evidence had also begun to point to Mack as the likely tipper.[220] The next logical step was to subpoena Mack and his records.

But a more powerful force was running in the opposite direction on the same set of tracks. Mack and Morgan Stanley had decided Mack would return as Morgan Stanley's CEO. But that was impossible if Mack faced an SEC lawsuit for insider trading arising out of the ongoing PCM investigation. That investigation had to go away. It did quite abruptly. The dirty work was done by my supervisors, but a higher office made the call. The fingerprints of Director Thomsen and Associate Director Berger were found all over that decision.

[219] See my August 26, 2005, email to Kreitman, Hanson, Eichner, Ribelin and Jama.

[220] See my July 19, 2005, email to Hanson attaching the Enforcement Monthly Report for June 2005 on the PCM investigation.

GARY J. AGUIRRE

August 21, 2006

The Honorable Richard C. Shelby
Chairman
Senate Committee on Banking, Housing and Urban Affairs
United States Senate
110 Hart Senate Office Building
Washington, DC 20510-2002

The Honorable Paul S. Sarbanes
Ranking Member
Senate Committee on Banking, Housing and Urban Affairs
United States Senate
309 Hart Senate Office Building
Washington, DC 20510-2002

Re: *The Favor*

Dear Chairman Shelby and Ranking Member Sarbanes:

Thank you for your letter of July 25, 2006. I understand from your letter the Committee "will continue to monitor the SEC's actions regarding [my] termination, as well as the upcoming questioning of Mr. Mack." Your interest in these matters is appreciated. However, I respectfully submit that neither my termination nor the questioning of John Mack ("Mack") is the primary issue raised by my sworn statement and supporting evidence submitted to the Committee last March. Both of those issues pale when placed side by side with another issue raised in those papers.

That primary issue involves a favor. The Securities and Exchange Commission ("SEC") is not supposed to give them, especially to suspects under investigation for securities fraud. Worse yet, this favor may have come from the top. Specifically, the issue is this: Did Enforcement Director Linda Thomsen ("Thomsen"), Associate Director Paul Berger ("Berger") and other senior Enforcement officials block a subpoena to John Mack in the summer of 2005 as a favor to him or to Morgan Stanley? If the answer to that question is yes, as the evidence below demonstrates, other questions must be asked and answered. Has it happened before? Was the favor returned? Did some higher office outside the SEC make the decision? If not, how far up the chain of command was that decision made? Did other senior SEC officials participate or look the other way? Did Chairman Cox authorize or accept a whitewash by the SEC's Inspector General ("IG") of the whole affair? Was I fired for not remaining mute in the face of that favor?

There is of course the indisputable fact of Mack's political influence, a theme my

immediate supervisor, Branch Chief Robert Hanson ("Hanson"), repeatedly struck in blocking the subpoena for Mack.[1] Mack is a "Bush" Ranger, meaning he raised at least $200,000 for the President during the 2004 presidential campaign.[2] But his fundraising went far beyond that level; he "reached elite status as a fund-raiser for President Bush" during the 2004 Presidential campaign.[3] For example, "When Mr. Bush began raising money [in 2003], one of his first stops was New York, where he collected $4 million at an event organized in part by Mr. Paulson and Mr. Mack."[4] Mack is also currently the CEO of Morgan Stanley, the largest contributor to the Bush 2004 Campaign.[5] According to Time Magazine's December 19, 2005, edition, Mack and one other candidate were "at the top of the list to replace Treasury Secretary John Snow."[6]

If Justice at the SEC has lost her blindfold, the capital markets are in trouble. The SEC regulates the securities markets. Its success "is a bulwark against possible abuses and injustice which, if left unchecked, might jeopardize the strength of our economic institutions."[7] Few principles are more deeply engrained in Title 17 of the Code of Federal Regulations, which regulates the SEC's operation, than the mandates obligating the SEC to handle all of its affairs, including the enforcement of the securities laws, with impartiality. No conduct would stray farther from those mandates than a double set of laws: one for the politically well connected and another for everyone else.

After my September 2, 2005, letter informed Chairman Cox of the favor, he directed his IG to conduct an "investigation" of my allegations. The IG employed a unique investigatory tool; his staff interviewed and took evidence from only those senior SEC officials who were the subject of my charges. The IG staff never contacted me. Not surprisingly, those charged with misconduct offered little evidence against themselves. The IG was therefore duty bound to find them blameless. This kind of an investigation has a name; it is called a "whitewash."

After two Senate committees began their own inquiry whether senior SEC officials granted Mack favored treatment, the SEC came up with Plan B. It directed its IG to conduct a new "investigation" and its Enforcement Division to take Mack's testimony. The same IG who did the first whitewash would do the new one. The same senior officials who blocked Mack's testimony fourteen months ago would take his testimony.

Both aspects of Plan B lack the same element that earlier SEC decisions lacked: *integrity*. How hard will the IG look for evidence Mack got a favor, when that same evidence proves his first investigation was a whitewash? How hard would senior officials search for clues that Mack tipped Samberg when those same clues would prove their misconduct fourteen months ago? The

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[1] See *infra* pp. 21-22, 26-29, notes 105-109 and 142-148.

[2] John Helyar, *A Record Year For Bigtime Donors*, FORTUNE, April 19, 2004, at 46.

[3] Landon Thomas Jr., *Credit Suisse Parts Ways with a Chief*, N.Y. TIMES, June 24, 2004, at C1.

[4] Glen Justice, Patrick McGeehan and Landon Thomas Jr., *Once at Arm's Length From Bush, Wall Street Is Now Biggest Donor*, N.Y. TIMES, October 23, 2003, at A1.

[5] Rick Westhead, *What U.S. vote means to investors, Incumbents often have an advantage*, TORONTO STAR, October 28, 2004, at L1 ("Morgan Stanley was tops through August with $527,030 (U.S.) worth of contributions to the Bush campaign.")

[6] Karen Tumulty & Mike Allen, *His Search for a New Groove*, TIME, December 19, 2005, at 38.

[7] 17 CFR 200.53

outcome of the IG investigation and the Mack testimony has already been written. When the IG finds Enforcement gave no favor to Mack, as planned, he will also validate his first investigation. When senior Enforcement officials find Mack clean, as planned, they will proclaim the same for themselves.

By taking Mack's testimony, the SEC has impliedly conceded the necessity of this step. It has also expressly conceded this point. On July 24, an SEC spokesman, in discussing the SEC's decision to take Mack's testimony, explained "the timing of enforcement division 'investigatory steps *depends solely on established procedures*...(emphasis added)."[8] Would not those same "established procedures" call for Mack's testimony to be taken in June 2005 when it was originally sought by the staff person heading the investigation? Or did some new evidence pop up in the last month? If so, what was that evidence? How was it overlooked before? In any case, why was Mack's testimony taken, as discussed below, only after two critical statutes of limitations had expired?

The SEC Could Not Have Given a Favor More Damaging to the Capital Markets

When senior Enforcement officials blocked the Mack subpoena, they derailed an investigation of suspected insider trading involving one of the world's largest investment banks and the world's largest hedge fund at the time.[9] The tip did not merely pass from one low level employee at the bank to another low level employee at the hedge fund. Rather, the incoming CEO of the investment bank was suspected of tipping the CEO of the hedge fund. *Few insider trading investigations could be more important to the integrity of the capital markets.*

With its focus on the flow of tips from an investment bank to a hedge fund, the investigation had begun to look into a new form of insider trading of global dimensions. Last June, the Federal Services Authority ("FSA"), the United Kingdom's counterpart to the SEC, recognized an "institutionalized" form of insider trading involving investment banks and hedge funds.[10] The FSA suspected that investment banks were giving illegal tips of pending mergers and acquisitions to their best hedge fund customers in return for lucrative hedge fund business.[11] The FSA observed that hedge funds were: "testing the boundaries of acceptable practice with respect to insider trading and market manipulation."[12] According to the FSA, "it had uncovered signs of insider dealing at almost a third of British M&A deals, with possible culprits including traders at hedge funds and investment banks."[13]

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[8] Siobhan Hughes, *SEC's Cox Seen Letting Stand Court Hedge-Fund Ruling*, DOW JONES NEWS SERVICE, July 24, 2006.

[9] Danny Hakim, *Hedge Fund Falls Victim to Tech Bear*, N.Y. TIMES, May 24, 2001, at C1. ("The world's largest hedge fund group, Pequot Capital of Westport, Conn., is believed to have about $15 billion in assets ...")

[10] Richard Fletcher, *Targeted: The Hedge Fund Insider Dealers*, SUNDAY TIMES (London) June 19, 2005, at Business 11.

[11] Gerard Wynn, *UPDATE 1-Reuters Summit-UK to Probe for Hedge Fund Market Abuse*, REUTERS News, April 4, 2006.

[12] James Drummond, *FSA Names Head of Hedge Funds Unit*, FIN. TIMES (London) September 20, 2005, at 6.

[13] Gerard Wynn, *UPDATE 1-Reuters Summit-UK to Probe for Hedge Fund Market Abuse*, REUTERS News, April 4, 2006.

The Financial Times explained what motivated the new institutionalized form of insider trading:

> But the hedge fund world has remained an insider Wild West. Information has been leaking across different departments of funds and between different markets—sometimes apparently aided by banks, which have every temptation to curry favour with the funds, given how much revenue they generate. As a result—and as the FSA recognizes—many recent UK capital markets announcements in London have been heralded by prior price swings.[14]

If large hedge funds and investment banks are able to engage in institutionalized insider trading by exploiting regulatory weaknesses in the U.K., it can be assumed that they would try to do the same here. A recent Wall Street Journal article (*Are Deal Makers on Wall Street Leaking Secrets?*) suggests exactly that.[15] It also suggests US hedge funds have likely found more sophisticated ways of exploiting the tips, e.g., using credit default swaps. No one should have any doubt whether US hedge funds would break the law in large packs to improve their returns if they thought they could get away with it. By October 2004, the SEC had identified 400 hedge funds that "picked the pockets of every every-day mutual fund investors."[16] In doing so, hedge funds compromised the integrity of two financial industries, mutual funds and broker-dealers, which the SEC regulates.[17] This fraud went on for years under the nose of the SEC.

The SEC has yet to engage this new specie of insider trading. It has *never* brought a case against either an investment bank or a hedge fund on the theory that the bank illegally tipped the hedge fund.[18] Indeed, until the SEC filed *SEC v. Kornman*, seeking disgorgement of *$142,000* in

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[14] Martin Dickson, *Insider Trading*, FIN. TIMES (London) June 24, 2005, at 22.

[15] Serena Ng, Dennis K. Berman & Kara Scannell "*Are Deal Makers On Wall Street Leaking Secrets? — Trading Jumps Before Acquisitions As Low Surveillance, High Payoff May Be 'Recipe for Bad Behavior'*" WALL. ST. J., July 28, 2006, at C1; see also: Henny Sender & Anita Raghavan, *Private Money: The New Financial Order—First Call - Worry Amid Hedge Fund Boom: Privileged Access to Information—Risk of Insider Trading Rises As Brokers Offer a Flood Of Market Data and Ideas—When Did Marshall Wace Sell?* WALL ST. J., July 27, 2006, at A1.

[16]

> In addition, we are seeing hedge funds used to defraud other market participants. Hedge fund advisers were key participants in the recent scandals involving mutual fund late trading and inappropriate market timing. We have counted almost 400 hedge funds and 87 hedge funds advisers involved in these cases. They were most of the late traders and market timers. They picked the pockets of every-day mutual fund investors.

Paul F. Roye, Director, Division of Investment Management, U.S. Securities and Exchange Commission, remarks at the open Commission meeting: Considering Registration under the Investment Advisers Act of Certain Hedge Funds (October 26, 2004) available at http://www.sec.gov/news/speech/spch102604pfr.htm.

[17] Brooke A. Masters, *Sec Finds Illegal Fund Trading; Survey Discloses After-Hours Deals*, WASH. POST, November 3, 2003, AT A1; Andrew Caffrey, *NASD Probing Fund Trading Dozens of Brokers, Securities Firms Facing Inquiries*, BOSTON GLOBE, November 12, 2003, at E1.

[18] The SEC has brought several insider trading cases against hedge funds arising out of PIPEs transactions, where the information was *legally* provided to the hedge fund. In those cases, the hedge fund or its principal breached the confidentiality under which the information was providing by trading on it. *SEC v. Hilary L. Shane*, SEC Litigation Release No. 19227 (May 18, 2005). ("The complaint alleged that Shane also agreed, both orally and in writing, to keep the information about the CompuDyne PIPE offering *confidential* (emphasis added).").

August 2004,[19] it had never brought an insider trading case against any hedge fund. Nor are there any known investigations where the SEC investigated the possibility that an investment bank had tipped a hedge fund, with one exception. The one exception was the investigation of Pequot Capital Management ("PCM"), the one I headed. That investigation had already begun to scrutinize the flow of illegal information from investment banks to PCM in March 2005.[20] That was months before the FSA's expressed its concerns about "institutionalized insider trading" in the U.K. and more than a year before The Wall Street Journal raised the question whether the same thing was happening in the US.

The SEC's failure to investigate "institutionalized" insider trading is curious. The Self Regulatory Organizations ("SROs"), such as the New York Stock Exchange ("N.Y.S.E."), send the SEC a continuous flow of insider trading referrals each year involving hedge funds. For example, in 2001, the N.Y.S.E. flagged a $5.97 million profit by PCM from its purchases of Heller Financial ("Heller") stock shortly before the public announcement that General Electric ("GE") would acquire Heller. Although the SEC ignored PCM's suspicious trading in Heller, it vigorously pursued an insider trading case against a low level GE executive and a Taiwanese Kung Fu instructor who split a $157,000 profit derived from trading Heller options.[21] The SEC brought in the Department of Justice who exacted a guilty plea from one of the amateur insider traders. The District Court sentenced him to fifteen months in prison.[22]

The minimum SEC inquiry into PCM's trading in Heller would have raised one red flag after another. Simply checking PCM's trading in Heller alone for July 2001 would have revealed a $17 million profit, not the $5.97 million the N.Y.S.E. found. Scratching a tad deeper would have revealed that PCM had bought more Heller stock ($44 million worth) than any individual or institution in the country during the four weeks before the announcement. Scratching a little deeper would have revealed that PCM had also sold short $36 million in GE stock, thereby positioning itself for the likely dip in GE's stock price when the tender offer was announced, which dip in fact occurred. The inescapable inference from these facts was that someone at PCM had a strong belief that GE would acquire Heller. By that point, the SEC would have to ask PCM one question: Why did you bet $80 million that GE would acquire Heller? That question would not be addressed to PCM for another four years, and then only after I blew the dust of the Heller referral and added it to the PCM investigation. As discussed below, PCM had no credible answers why it placed its $80 million bet.

By the spring of 2005, the primary focus of the investigation was the possible flow of illegal tips from investment banks to PCM. As discussed below, we had reason to suspect that PCM and its CEO, Arthur Samberg ("Samberg"), routinely engaged in insider trading. The PCM investigation was making excellent progress until late June 2005. It was abruptly halted when its focus shifted to Mack, who at that time was about to become Morgan Stanley's new CEO.

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[19] Litigation Release No. 18836 (Aug. 18, 2004).

[20] On March 1, I emailed my supervisors and other staff working on PCM: "I think we should also serve subpoenas on key broker-dealers, such as Goldman and Morgan Stanley, whose ties to Pequot propitious timing seem to be frequent." I issued subpoenas to Goldman Sachs and Morgan Stanley later that month for records relating to their prime brokerage and trading relationships with PCM.

[21] Reuters, *2 Men Are Accused Of Insider Trading*, N.Y. TIMES, July 30, 2002 at C1.

[22] Reuters, *Former Executive Pleads Guilty*, N.Y. TIMES, October 23, 2002 at C2.

To sum up, the PCM investigation had focused on a new type of insider trading of global dimensions, "institutionalized insider trading," the illegal flow of information from investment banks to hedge funds. The investment bank under investigation was the third largest in the world at the time. The hedge fund was the largest in the world at the time and was suspected of routinely engaging in insider trading. Given the SEC's failure to look at this area before, it was critical to the capital markets that the investigation be thorough. Instead, senior Enforcement officials halted the investigation by blocking the issuance of any subpoenas to the only suspected tipper.

But it gets worse. The suspected tipper was the incoming CEO of the investment bank. The suspected tippee was the CEO of the hedge fund. If those at the top of these pyramids believe that insider trading is an acceptable business risk, their subordinates—everyone else in both companies—will not likely have higher standards. *It is hard to imagine how the SEC could have given a favor more damaging to the capital markets.*

The Status of the Insider Trading Investigation of PCM and Its CEO in June 2005

The investigations of Samberg's and Mack's roles as the possible tippee and tipper in the GE-Heller matter were interdependent in two ways. First, as discussed below, the circumstances surrounding Samberg's trading in GE and Heller in July 2001 defined the profile of the person who likely tipped him. Only Mack fit the profile. Second, when senior SEC officials blocked the subpoena for the only person who met the tipper's profile, they rang the death knell on proving the case against Samberg and PCM. No insider trading case can be proved without establishing the source of the tip.

PCM's History of Suspected Insider Trading

There were multiple reasons in 2005 to scrutinize Samberg's and PCM's trading over the prior few years for the use of illegal tips. Market surveillance officials of the N.Y.S.E. informally advised me that PCM and two other hedge funds, which they named, had most often been the subject of insider trading referrals to the SEC in recent years. One of those officials also told me that "PCM was just too lucky." In the fall of 2004, I had located thirteen other SRO referrals over the prior three years involving PCM that had not been investigated. SROs referred another four over the next few months. In response to an SEC subpoena, PCM produced records of yet other SRO referrals. The SEC's New York District Office was also conducting a separate investigation of PCM for possible insider trading arising out of a PIPEs transaction. Independently, Hilton Foster ("Foster"), perhaps the most experienced SEC attorney at conducting insider trading investigations, told me that he had investigated PCM a decade earlier and suspected Samberg and PCM were "serial inside traders."[23]

There was also the money PCM paid to its brokers-dealers: $226 million during the twelve month period in which it did the GE-Heller trades.[24] PCM paid an "average commission

[23] See my October 8, 2004, email to Cain and Grime, Ex. 49.

[24] See Ex. 25, PCM document responding to SEC inquiry, question 7.

rate" to its brokers of five cents a share.[25] These trades could have been executed for as little as a penny a share electronically.[26] PCM also paid many more millions in fees to its prime brokers. In return for these fees, hedge funds in general,[27] and PCM in particular,[28] received favors and information. The key question is where the broker-dealers drew the line on the type of favors and information they gave PCM and where PCM drew the line in receiving them.

Then there was the obvious good-twin bad-twin comparison between PCM and Andor Capital Management ("Andor"). Andor was formed in September 2001 when PCM cofounders, Samberg and Daniel Benton ("Benton"), split up PCM's employees and its $15 billion in assets. Samberg would continue with PCM, but with half the assets to manage. Andor would go its separate way, with the other $7.5 billion to manage. I could find few SRO referrals of Andor in comparison with PCM from 2001 through 2005. I also asked Eric Ribelin ("Ribelin"), a branch chief in the SEC's Office of Market Surveillance, if he could get an exact number of the referrals on Andor. Ribelin responded: "The referrals are by issuer, not by account that traded, so there is no electronic way to key on it. Put it this way, before you mentioned Andor I'd never heard the name. I've seen and heard Pequot's name for years in referrals and in conversations with SROs."[29]

Finally, Samberg had sought material nonpublic information on another company two weeks before he was suspected of obtaining the Heller tip from Mack. In April 2001, Samberg hired David Zilkha out of Microsoft, where he was employed as a product manager. The emails between Samberg and Zilkha show again and again how Samberg used Zilkha to get information—some obviously material and nonpublic—from his contacts at Microsoft. There were critical gaps in the evidence that prevented Enforcement from using these emails as a basis for a separate action. However, we believed the emails showed how Samberg operated to obtain material nonpublic information and thus provided an answer to the mystery why he bet $80 million in July 2001 that GE would acquire Heller.

Samberg began pumping Zilkha for information almost two months before he left Microsoft. Samberg's first email to Zilkha on February 28, 2001, asked: "Do you have any current view [on Microsoft] that could be helpful? Might as well pick your brain before you go on the payroll!!"[30] The reply did not appear to pass along material nonpublic information.[31]

Later, Samberg's emails became more direct. On April 30, after Zilkha had joined PCM, Samberg emailed Zilkha, asking: "those [MSFT] contacts have any views on the direct tv –

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[25] *Id.* During a phone interview, a senior Morgan Stanley trader told several staff members including me that PCM usually paid five cents a share for executing its trades.

[26] Ianthe Jeanne Dugan, *In the Loop: How Inside Stock Tips Still Flow Despite Regulatory Crackdowns—Some Hedge Funds, Especially, Find Ways Around Efforts To Level the Playing Field—Heads-Up on a Rating Change*, WALL ST. J., August 27, 2004.

[27] *Id.*

[28] Ex. 25. The Morgan Stanley trader provided this information during the same phone interview.

[29] February 3, 2005, email from Ribelin to me, Ex. 50.

[30] See Samberg's email of February 28, 2001, to Zilkha, Ex. 7.

[31] *Id.*

Murdoch –rumored msft possible deal?"[32] This email shows Samberg using Zilkha to confirm — through his Microsoft contacts—whether the rumor was true that Microsoft would participate in a joint acquisition of DIRECTV. Staff suspected that Samberg used Mack two months later to do the same thing.

In another email, Zilkha reported back:

> Just spoke to one of my buds in the company [Microsoft]. He had 2 data points.
> 1) Orlando Ayala, in charge of sales worldwide, told managers this week that the quarter looks to end on a strong note.
> 2) Bob McDowell, in charge of Microsoft Consulting, told my friend that MCS was having a blow out quarter.
>
> I asked about negative data points and he said he hadn't heard of any. [33]

In another email, Samberg directed Zilkha not to share information with an analyst that Zilkha had learned from his contacts inside Microsoft. Zilkha and Samberg had this edited exchange about Microsoft's expected earnings:

> Zilkha: I told Sherlund [an analyst] on the call that MSFT [Microsoft ticker symbol] was anticipating beating earnings for the Q as of last Thursday. He asked if me whether he could put out a note talking up MSFT. I told him I'd let him know tomorrow after I heard back from my contact–and had gotten your take on what we would like we'd like him to do.[34]
>
> Samberg: As to msft, I don't want to be associated with anything Sherlund does. If, after talking to you he feels comfortable with the stock, fine, *but we absolutely should not be relaying info to him about what you had learned via contacts within the company.* [35]

Here is another Samberg-Zilkha exchange, while Zilkha was still employed by Microsoft, on April 7:

> Samberg: I own some msft on the win2000 cycle, despite recurring indications from knowledgeable people that the company will either preannounce or take guidance down. Any tidbits you care to lob in would be appreciated.[36]
>
> Zilkha: I will get back to you on MSFT ASAP.[37]

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[32] See April 30, 2001, email from Samberg to Zilkha, Ex. 8.
[33] See June 15, 2001, email from Zilkha's to Samberg Ex. 9.
[34] See June 18, 2001, email from Zilkha to Samberg, Ex. 10.
[35] *Id.* On the same day, Reuters said there was "Mounting speculation about a profit warning from Microsoft." *Eurostocks down, techs hit again by Microsoft talk*, REUTERS News, June 15, 2001.
[36] See April 6, 2001, email from Samberg to Zilkha, Ex. 11.
[37] *Id.*

Zilkha did not reply by email, at least in no email that Enforcement staff could find, so there was no proof what he told Samberg. However, between April 9 and 11, Samberg bought 30,000 options contracts on the assumption that Microsoft would beat its earnings, the reverse of his belief stated in his email.[38] On April 20, Microsoft did in fact beat its earnings. Samberg made a $12 million profit on his April 9-11 option trades.[39]

On April 23, Zilkha's first day at PCM, Samberg sent him an email: "I shouldn't say this, but you have probably paid for yourself already!"[40] Samberg emailed two other PCM executives on the same day: "our new guy, david zilkha [sic], is in ct today. check [sic] him out. He's already got a great p&l [profit and loss] on his msft input."[41] *Zilkha had earned his "great p&l" with PCM while still an employee of Microsoft.*[42]

In general, the Samberg-Zilkha emails were anomalous. The evidence suggests two reasons. First, Samberg likely used instant messaging when he did not wish to leave a trail, which would have been the case if he was he was soliciting or receiving material nonpublic information.[43] Instant messaging left no telltale image in any server or computer. Second, Samberg was under pressure to perform after April 2001, when his partner announced he intended to leave with half of PCM's assets and thus Samberg may have taken greater risks than usual.[44] However, one of my colleagues found one similar email exchange in April 2001 about Morgan Stanley stock: *an email exchange between Samberg and Mack, shortly after Mack left Morgan Stanley.*[45]

Samberg's Testimony Advanced the Investigation of PCM's Trading in GE and Heller

The first subpoenas to PCM were issued in early February 2005. In April and May, PCM began producing significant volumes of its records.[46] I took Samberg's testimony in early May and again in early June 2005. By early June 2005, the evidence suggested that Samberg had relied on an illegal tip in directing PCM's trades in GE and Heller. I summarized that evidence in my email of June 27, 2005, to Assistant Director Kreitman, Hanson and Ribelin, who attended both sessions of Samberg's testimony.[47]

The first aspect of Samberg's and PCM's trading in Heller and GE to attract our attention was its size. Samberg directed PCM to purchase $44 million in Heller stock from July 2 through July 27, 2001. That made PCM the largest purchaser of Heller stock in the nation during the four weeks just before the acquisition was announced.[48] But even those purchases were not enough;

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[38] See the timeline of events, including Samberg's trading, attached as Ex. 12.

[39] *Id.*

[40] See April 20, 2001, email from Samberg to Zilkha, Ex. 13.

[41] See April 23, 2001, email from Samberg to Broach and Schendel, Ex. 14.

[42] I was fired before I had the opportunity to question Samberg about Zilkha.

[43] Ex. 15 and Ex. 16.

[44] Gregory Zuckerman, *Pequot Partners Split as Benton Plans to Launch His Own Funds*, WALL ST. J., April 4, 2001, at C1; See also my June 27, 2005, email to Kreitman, Hanson and Ribelin, Ex. 2.

[45] I do not have a copy of this email, since it was not in my possession at the time I was fired.

[46] See my May 9, 2005, email to Florschutz, Kreitman and Hanson, Ex. 1.

[47] See Ex. 2.

[48] See my August 4, 2005, email to Hanson, Ex. 17.

Samberg was trying to buy larger blocks of Heller stock.[49] This raised the obvious question: What did Samberg find so attractive about Heller that he was willing to outbid everyone else in the country to own it, including those who followed it closely?

The same was true of Samberg's trades in GE. Samberg directed $36 million in shorts on GE, but that was also not enough. He was trying to short even larger amounts.[50] Again, why did Samberg have the conviction that GE was going to fall?

I was looking for answers to these questions when I took Samberg's testimony, but did not get them. At the first session of his testimony in early May, Samberg gave six reasons for his decision to buy Heller stock. Before the second session, I subpoenaed the documents that his lawyers had shown Samberg before he testified. It turned out that Samberg's attorneys, and not Samberg, had done the research why Samberg bought Heller in 2001, but that research was done four years after Samberg had directed the trades. None of the records Samberg's attorneys had shown him came from PCM's or Samberg's files.[51] Nor could Samberg recall ever seeing these records before. In short, his attorneys had spoon-fed him his testimony.[52]

Independently, Samberg eliminated any legitimate source of information for his decisions to buy Heller stock. Samberg said he spoke with no one regarding his decision to purchase Heller stock: not any of PCM's 250-person staff, not anyone at Heller (contrary to his practice),[53] not anyone at any financial services company, and not any analyst or consultant. Samberg also stated that Heller was in an industry outside the focus of his hedge fund, that he did not follow Heller "in the way people follow stocks before it [sic] was purchased."[54] Samberg also said his decision to purchase Heller in July 2001 had "nothing to do with Heller."

Finally, in the millions of records PCM produced, only two had any reference to PCM's trading in Heller. In one, Samberg asked his trader, "where [sic] are we on HF?"[55] In the other, Samberg replied to an email informing him the acquisition of Heller had just become public and the resulting 50% leap in its stock price. Samberg replied: :) :) :) :) :) :) Samberg could recall no other e-mails relating to Heller.[56]

Incidentally, the smiley face—:)—showed up in two other emails that caught our attention. Joseph Samberg, the president of his own hedge fund and son of Arthur Samberg,[57]

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Samberg told Fortune Magazine in 1998 that he attributed PCM's high returns to its practice of contacting public companies for information. He testified that PCM had continued this practice in 2001. "The investment staff visits thousands of companies each year, conducts extensive interviews with management as well as competitors, suppliers, distributors, and customers." Lawrence A. Armour, *A Hedge Fund Winner; Ignoring Wall Street Research Pays Off*, FORTUNE, October 12, 1998, at 224.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Mark Veverka, *The Games People Play II: A Winning Hand in Cellphone Poker*, BARRON'S, September 5, 2005, at 28.

sent an email to his father on July 12, 2001, offering this insight about Mack stepping in as CSFB's new CEO:

> If you read the front page of the C Section of the WSJ, you will see that our friend and latest investor [in Joseph Samberg's hedge fund], John Mack, is to become the new CEO of CFSB, the no.2 underwriter in the U.S.! It's nice to have friends in high places...:)[58]

On September 26, 2001, Samberg also sent this email to another prominent hedge fund manager: "don't know most of the things I'm buying. :-)"[59] That was clearly true when Samberg directed PCM to buy $44 million in Heller stock.

Samberg claimed he saw an analyst's report in July 2001 like the one his attorneys showed him before he testified in 2005. Neither PCM nor Samberg produced such a report. Nor was there a hint of one in the documents PCM produced in response to SEC subpoenas. Here is Samberg's testimony at the second session on (1) the report shown to him by his attorneys before the first session of his testimony and (2) the one he claimed he saw in July 2001:

> Q Have you seen this report in any e-mail dated before July 30, 2001?
> A I don't recall seeing it.
> Q Do you have a high regard for sell side analysts?
> A I have a high regard for them as people. I don't have a high regard for using their reports to make investment decisions.
> Q It would have been very unusual for you to rely on a sell side report, would it not, in making an investment decision?
> A Historically, that is true.
> Q In fact, isn't it true, sir, that you don't think they're worth a damn?
> A In general, I don't think their reports are worth a damn. The people can be, but not the reports
> Q Right. And you've made that statement publicly, have you not?
> A I have.
> Q So this is -- Exhibit 19A is sell side research, is it not, sir?
> A Sure is.
> Q Exactly what you said isn't worth a damn. Correct?
> A You bet.
> Q So is it fair to say that the research you saw in July 2001 about Heller Financial also wasn't worth a damn?
> A I really don't know what I saw.[60]

Samberg also described a host of practices PCM normally followed in making trading decisions in 2001.[61] These practices included:

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[58] See my June 3, 2005, email to Hanson, Kreitman, Ribelin, Foster, Eichner, Conroy, Glasco and Miller, Ex. 30.
[59] See September 26, 2001 email from Samberg to DiMenna, Ex. 45.
[60] *Id.*

1) "Pequot Capital's investment process begins with an intensive research of a company's underlying fundamentals."

2) "Investment ideas [were] generated as a result of meetings directly with company senior management teams [and that] this [allowed] the investment team to understand a company's management structure, thought process, strategic direction, and products."

3) "In-depth meetings and industry research provides the research to prospective fund's analysts with an overview of a particular industry as well as the individual company, and allows for comparisons to be made within that specific industry."

4) "Based on research, the investment analyst is able to formulate business models and discuss their ideas with other members of the investment staff and the respective fund's portfolio manager prior to a position being included within the portfolio."

5) "The investment approach [quoted above] is consistent across all funds managed by Pequot Capital."[62]

According to his testimony, Samberg followed none of these practices in directing $80 million in trades in Heller and GE in July 2001. Nor was there any clue in PCM's records that any of these practices had been followed.[63]

Samberg also offered no explanation for his decision to place $36 million in shorts on GE. He testified:

> Q Now, two months later, almost two months later, there is a short by you, sir, on July 25, 2001 in the amount of 756,000 shares or just shy of $33 million.
> Q Do you see that, sir? [I was showing Samberg GE trade blotter]
> A I do.
> Q Now, can you tell us the reasons that you felt that GE should be shorted at that particular time?
> A No, I can't.

Likewise, PCM produced no records that could explain Samberg's decision to short sell $36 million in GE stock.[64]

This was the status of the case against Samberg and PCM in early June. I understood, and my supervisors told me, that no case could be ever filed against PCM and Samberg without proof who had tipped Samberg. Other staff and I began combing through the PCM records for any clue of the tipper's identity. During the second session of his testimony, I questioned Samberg whether

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

he knew any of the individuals who had participated in the acquisition. That produced two weak leads which I later eliminated. In early June, evidence began to point to Mack. By August, the evidence indicated that Mack, and only Mack, met every element of the tipper's profile.[65]

The Decision to Take Testimony: The Standard for Everybody Other than Mack

Before discussing how my supervisors reacted to my request to subpoena Mack, I discuss first how they reacted to my request to subpoena everyone else. Their reactions were as different as night and day. During the investigation, I issued over ninety subpoenas. Of those, I served approximately thirty subpoenas on PCM—five on PCM for records and the rest on officers, portfolio managers, traders and other staff. The other sixty or so were served on third parties, mostly public companies and investment banks.

From the standpoint of authority, I did not need my supervisors' approval or consent to issue a subpoena. The Commission's formal order in the PCM investigation provided: "Gary J. Aguirre [and others]...and each of them, be, and hereby ...are empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, require the production of books..." However, my superiors could of course direct me not to issue a subpoena.

Until Mack, I merely informed my superiors who I intended to subpoena and invited their feedback. For example, on February 18, 2005, I emailed Hanson and Kreitman of my intention to subpoena twenty-seven individuals.[66] Of those twenty-seven individuals, seventeen were employed by PCM, five were officers of public companies (including CEO and CFO of one company), and another five were investment bankers. In general, the person subpoenaed was suspected of giving or receiving material nonpublic information. Neither Kreitman nor Hanson asked why I had decided to issue any of the subpoenas. Neither requested that I make any factual showing why the witness was believed to have received or provided material nonpublic information.[67] Indeed, neither Hanson nor Kreitman even responded to my email.

Further, far more evidence implicated Mack than any of the twenty-seven individuals whose subpoenas Kreitman and Hanson approved by their silence. For example, no evidence indicated any of the five investment bankers even knew the PCM employee who did the suspected illegal trades. By contrast, in Mack's case, Mack and Samberg knew and trusted each other, had shared stock tips, and spoke just before Samberg began to direct the Heller trades. Then there was the fact that Mack met the tipper's likely profile.[68] No comparable evidence existed for *any* of the other twenty-seven suspected tippers or tippees *before* Kreitman and Hanson authorized the 27 subpoenas to be issued by their silence.

My supervisors approved the remaining seventy or so subpoenas in much the same way. I recall no occasion where my supervisors and I even discussed the need for a stronger factual

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[65] See my August 4, 2005, email to Hanson, and my August 24, 2005, email to Berger, Ex. 17.
[66] See my February 18, 2005, email to Hanson and Kreitman, Ex. 43.
[67] *Id.*
[68] See *infra* p. 15-16.

showing before a subpoena could be issued. Only the Mack subpoena had that precondition and the required factual showing constantly changed.

But the issuance of subpoenas was not the only one way of obtaining information from witnesses or suspected tippers or tippees. A simpler way was to contact them by phone, usually done by two or more Enforcement staff members, and then question them about the relevant facts. In February 2005, Kreitman gave *carte blanche* to two staff members working on the PCM investigation to contact all former PCM employees, officers, and directors—more than 200 individuals.

The Reasons for Taking Mack's Testimony

The reasons for taking Mack's testimony are discussed next. My lengthy emails of August 4, 2005, and August 24, 2005, *again* explained to Hanson and Associate Director Berger why I believed Mack's testimony was the next logical step in the investigation. The email began:

> You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. [Third] If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.[69]

The primary reason to subpoena Mack and his records was the fact that he matched the profile of the likely tipper. This process—comparing the elements of the likely tipper's profile with the suspect's profile—was only done with Mack. The evidence implicating Mack, whose testimony was never taken, was more compelling than the evidence implicating any other suspected tippers or tippees before their subpoenas were issued. My supervisors approved the first subpoenas for these thirty or so individuals without comment.

In analyzing the evidence suggesting Mack tipped Samberg, several factors should be kept in mind. First, no evidence came from Mack. Unlike Samberg, *no* subpoena was served on Mack, not even a records subpoena. He therefore produced no emails, phone records, personal calendar, credit card statements or other records which are usually critical in developing an insider trading case.[70] The standard SEC practice is to seek records from the suspected tipper and

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[69] See my emails of August 4, 2005, to Hanson, and August 24, 2005, to Berger. Ex.17. Both emails have an error. In a paragraph describing Samberg reads: "We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million." That was the amount of Samberg's holdings in Pequot, not Mack's.

[70] See *infra* p. 39.

tippee. From these records, the case is built pebble by pebble until the mosaic becomes visible. That practice was followed in the PCM investigation, except for Mack. The evidence suggesting Mack was the tipper came exclusively from Samberg, PCM and third party sources.

For the same reason, the strength of the evidence against Mack cannot be compared with the evidence against Samberg. Multiple subpoenas had been served on both PCM and Samberg seeking evidence that he had used material nonpublic information in directing the GE and Heller trades. Samberg had also testified twice. Most of the evidence against Samberg comes from the two sessions of his testimony.[71]

Another factor to be kept in mind was the purpose of presenting the evidence to my supervisors indicating Mack had tipped Samberg. The sole issue was whether there was enough evidence *to issue a subpoena to Mack*. No one suggested there was enough evidence to file a case against Mack or Samberg or that we should even consider filing a case after Mack's testimony was taken.[72] Until Mack, neither Hanson nor Kreitman had required any evidentiary showing before a subpoena could be issued for the testimony of a suspected tipper or tippee. Nor had they offered a rational explanation what evidence would be required before Mack's testimony could be taken. My email-memos to them summarizing the Mack evidence went unanswered. In that void, I provided a standard: Mack met the profile of the suspected tipper.[73]

Finally, I discuss the status of the evidence in August 2005. I began to inform my supervisors of the evidence involving Mack in early June. By mid-June 2005, my supervisors authorized me to present the GE-Heller matter to the FBI and US Attorney in connection with a possible criminal investigation, including Mack and Samberg's possible roles as tipper and tippee. The evidence suggesting that Mack was the tipper continued to strengthen in July and August. *Yet, even with stronger facts, my supervisors would not allow an administrative subpoena to be issued for Mack, even though they were willing to seek a criminal investigation on lesser evidence two months earlier.*

The Profile of the Tipper in the GE-Heller Matter

The profile of the tipper arose out of the trading that Samberg directed. It had these elements:

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[71] See Ex. 2.

[72] To the contrary, I told my supervisors that Mack's testimony was a critical intermediary step in the investigation:

> Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Ex. 17.

[73] The elements considered in the tipper's profile are very similar to the factors typically considered in proving an insider trading case. See *infra* note 198.

1) The tipper should have had potential access to information that GE would make a tender offer for Heller;
2) The tipper likely spoke with Samberg *shortly* before he began to trade;
3) The tipper likely obtained the information *shortly* before he provided it to Samberg;
4) The tipper should have had one or more motives for tipping Samberg;
5) The tipper and Samberg likely trusted each other.[74]

As discussed below, only Mack satisfied each element of the profile.

Mack Had Potential Access to Information that GE Intended to Acquire Heller.

Mack had potential access to information from either of two possible sources. He left Morgan Stanley in late March 2001. Morgan Stanley advised GE on the Heller acquisition since May 2001. Mack was known to have had strong contacts with the investment bankers at Morgan Stanley.[75] No investigation of Mack's communications with his contacts at Morgan Stanley was possible for several reasons. First, no subpoena could be issued to Mack for his emails, phone records or calendar, the customary way of ascertaining those facts. Second, Morgan Stanley made a practice of destroying emails during the period in question.[76] Finally, after Mack stepped in as CEO, Morgan Stanley reversed its position that it would search through backup tapes for Mack emails.[77]

The evidence pointed more concretely to another source. According to Business Week, Credit Suisse ("CS") had been "wooing" Mack to step in as the CEO of Credit Suisse First Boston ("CSFB") since April 2001.[78] But CS had competition. Merrill Lynch was also "wooing" Mack.[79] That year, Merrill Lynch ranked as the top investment banker in the world and CSFB ranked third.[80] In making a choice between Merrill Lynch and CSFB, Mack—known as the "dealmaker"—would likely want to know what significant deals CSFB already had in its inventory. For the same reason, CSFB had a motive to tout its significant deals, like the Heller acquisition, to help "woo" Mack away from the number one investment bank, Merrill Lynch.[81]

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[74] See my emails to Hanson of June 6, 2005, Ex. 26, and June 20, 2005, Ex. 5; my email to Hanson, Ribelin and Kreitman of June 28, 2005, Ex. 3; and my email to Kreitman and Berger of July 27, 2005, Ex. 19; and August 4 and 24 to Hanson and Berger respectively, Ex. 17.

[75] *Id.*

[76]

> The firm claimed it hadn't retained emails related to numerous big investigations when in fact it had. The SEC alleges the firm destroyed other emails it was required to keep. During settlement negotiations, regulators discussed but opted not to provide some recourse for small investors affected by the document problems, according to people familiar with the discussions.

Susanne Craig, *New Morgan Stanley Has Old Troubles Over Emails, Investor-Lawsuit Clouds*, WALL ST. J., May 24, 2006, at C1.

[77] See my July 19, 2005, email to Kreitman, Hanson, Ribelin, Eichner, and Jama, Ex. 47.

[78] David Fairlamb & Emily Thornton, *Is John Mack's Knife Sharp Enough?*, BUSINESS WEEK, July 30, 2001, at 76.

[79] Ex. 17.

[80] Fairlamb & Thornton, *supra*, note 78.

[81] Ex.17.

The Heller acquisition was the second largest GE had ever made.[82] It could also have been mentioned by CSFB's CFO as something Mack would step into when he started with CSFB two weeks later on July 12, since the tender offer would be announced eighteen days later on July 30, 2001.

Mack's Contacts with Samberg

As discussed above, at Samberg's direction, PCM was the largest purchaser of Heller stock during July 2001. Samberg would likely have started his accumulation of Heller earlier than July 2, 2001, if he had got the tip earlier. Hence, Samberg likely received the tip shortly before he began trading on July 2, 2001. Accordingly, other staff and I combed through the records PCM and Samberg produced looking for someone who (1) had contact with Samberg shortly before July 2 and (2) had some reason to know about GE's efforts to acquire Heller. Working back in time from July 2, we found only one person: Mack. Samberg spoke with Mack on Friday June 29, 2001, after the close of the market.[83] That matched perfectly with Samberg's decision to begin buying Heller with a vengeance *the next trading day after he spoke with Mack*. In searching through Samberg's emails, calendar, and phone and credit card records over the summer of 2005, I found no other leads to a possible source of the GE-Heller tip to Samberg. In August, I informed Hanson and Berger of that fact.[84]

Mack's Contacts with CSFB: The Right Contacts at the Right Time

The key trading dates for Samberg were July 2, 2001, July 10, 2001, and July 25, 2001.[85] On July 2, 2001, Samberg first traded Heller. Samberg increased his buy order with PCM's trader from 15,000 shares on July 9 to 455,000 on July 10. Samberg began placing his $36 million in GE shorts on July 25.[86] This suggests that the tipper told Samberg about the pending Heller acquisition shortly before July 2, and then gave Samberg updates around July 9 and again around July 25.[87] These trading patterns also imply that the tipper got his information shortly before July 2, July 10, and July 25.

Mack had potential access to information about the GE-Heller acquisition through his contacts with CS and CSFB in May and June 2005. Mack dealt primarily with the CS chairman about stepping in as the CEO of CSFB. Mack could have learned about Heller from him. However, the CS chairman conducted his negotiations with Mack from CS's headquarters in

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[82] Nikhil Deogun and Matt Murray, *GE Capital to Acquire Heller Financial—Deal Price of $5.3 Billion Means Specialty Lender Will Fetch Big Premium*, WALL ST. J., July 30, 2001, at A3.

[83] See Samberg's email of June 30, 2001, to Jerry Pock, Ex. 20. See also Exhibits 2, 5, 17, 26, and 19.

[84] Ex. 17.

[85] Ex. 2.

[86] *Id.*

[87] We had not found a contact between Mack and Samberg around July 9 or July 25. However, our records from PCM and Samberg were incomplete and nonexistent from Mack were t Samberg's personal and PCM phone records were incomplete for 2001. The same was true of PCM's production of Samberg emails for2001. I informed Hanson by email on June 1,2005, that I suspected PCM or its attorneys had held back Samberg emails for 2001. For example, PCM had produced 837 Samberg emails for July 2001, when PCM managed $15 billion in assets and had 250 employees and 3,337 Samberg emails in July 2002, when it was half its former size due to Ander spinoff. Further, Samberg produced none of his instant messaging for this period since it had not been saved. Of course, we had no records from Mack to check, because of the subpoena bar.

Switzerland, according to a CSFB attorney,[88] which was of course beyond the reach of SEC subpoenas.[89] The same attorney informed me that there were also potential issues under Swiss privacy law if we were to seek the cooperation of Swiss Government in obtaining compliance with an SEC subpoena. He offered the obvious solution: "Why don't you get this stuff from Mack?"[90]

But Mack also had two meetings with CSFB's CFO in the US that fit nicely with Samberg's trading pattern. The first meeting was on approximately June 28 or June 29.[91] Again, one topic of keen interest for Mack would likely have been CSFB's pending deals. In the evening of June 29, Mack phoned Samberg.[92] It is during this call that we suspected that Mack tipped Samberg about Heller. *The next trading day, Monday, July 2, Samberg began buying huge blocks of Heller.*[93]

Mack had the second meeting with CSFB's CFO on approximately July 9, 2001. That correlates with the date GE "bumped" its offer for Heller.[94] The Mack meeting with CSFB's CEO, during which Mack could have received an update on the pending acquisition, fit nicely with Samberg's dramatic move on July 10.[95] Finally Mack became CEO of CSFB on July 12, 2001, two weeks before July 25, 2001, when Samberg began placing his $36 million in shorts on GE.[96]

I summarized this information to Hanson on August 4 and Berger on August 24:

> He [Mack] also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time.[97]

Mack's Motive for Tipping Samberg

There were a number of motives for Mack to tip Samberg:

1) Mack, his wife and their foundation were invested in as many as fifteen PCM funds.[98] Hence, PCM's profits on insider trading also benefited Mack. For example, Samberg

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[88] See Ex. 21.
[89] *Id.*
[90] See attachment 14 to Exhibit 19,.
[91] See my August 17, 2005, email to Kreitman and Hanson, Ex. 21 and Ex. 17.
[92] Ex. 20.
[93] Ex.2.
[94] *Id.*
[95] Exhibits 2 and 17.
[96] *Id.*
[97] Ex. 17.
[98] See Excel spreadsheet with Mack and his wife's investments in PCM funds; attachment 11 to Ex. 19.

allocated at least $5.4 million in profits from his GE-HF trades to Pequot Partners, a fund that Mack got into shortly before the GE-Heller trades.[99]

2) Mack was admitted directly into special PCM deals. One key deal went by the code name "Fresh Start," a Lucent spin-off that PCM bought cheap. Mack finally got a $5 million piece of Fresh Start the same night and during the same phone call he was suspected of giving Samberg the Heller tip. Just nine days earlier, according to a Samberg email, Mack was "beating [Samberg's] chops" to get into Fresh Start. Neither the PCM principals nor Samberg's son seemed happy about Mack getting into this Fresh Start.[100] It appears that Fresh Start became Celiant Corporation; Mack served on its board as a director.[101]

3) Mack got to put at least $7 million (likely much more) into PCM funds that were closed. These funds had sensational returns at that time. For example, Samberg's emails and spreadsheet of Mack's investments indicate Mack or his wife poured millions into the Pequot Scout Fund. It had a 677% return during the eight years prior to June 20, 2002.[102] Samberg's attitude toward making exceptions for well connected investors was reflected in his email of July 2, 2001: "the only fund open now is partners, and although the min is $5mm, we are always willing to make significant exceptions for *important industry contacts* (emphais added)."[103] Mack, his wife or their foundation invested money in fifteen PCM hedge funds, which usually had a $5 million minimum.[104]

4) Mack and Samberg solicited and obtained stock tips from each other. One of Samberg's emails to Mack in April 2001, shortly after Mack left Morgan Stanley, asked Mack for information about Morgan Stanley stock. Having just been its CEO, Mack would logically still have knowledge of material nonpublic information. Mack told Samberg he had just unloaded a bundle of Morgan Stanley stock.[105] Samberg did not trade on this news. These emails had the familiar ring of Samberg's email exchanges with Zilkha.

5) Samberg was proposing Mack as a director on two boards.[106]
6) They were very close friends, e.g., Samberg's secretary said "Mack loves you." On this point, my August 24 email reads in part:

> In July 2001, Samberg's company was splitting apart. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half

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[99] See Exhibits 2 and 19.
[100] Ex. 17.
[101] *Celiant Corporation Elects John J. Mack, Chief Executive Office of Credit Suisse First Boston, to Its Board of Directors*, BUS. WIRE, October 24, 2001. I was unable to confirm before I was fired whether this was the same deal, but it appeared to fit the facts we knew. I had issued a subpoena to PCM to get its records involving Mack-PCM ventures, but I was fired before they were produced.
[102] PCM response to SEC inquiry, question 5, Ex. 51.
[103] Ex. 5.
[104] See attachment 11 to Ex. 19.
[105] I am not in possession of this email. However, I know where it can be found at the SEC.
[106] See *Celiant*, *supra*, note 101.

> the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee 'might walk.' A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him."[107]

The mere relationship between Mack and Samberg was a sufficient "benefit" to Mack to establish a securities violation if he gave Samberg the Heller tip.[108]

Mack and Samberg Trusted Each Other

On this point, my August 4 email to Hanson and August 24 email to Berger read:

> [Samberg] holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.[109]

There is also the fact that Samberg brought in Mack as PCM's chairman in June 2001 when the insider trading investigation was clearly focused on trading directed by Samberg. My June 3, 2005 email to Hanson read in part:

> John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. ...Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets?[110]

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[107] See Exhibits 2 and 17.

[108] *Dirks v. SEC*, 463 U.S. 646, 664 (1983) ("The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.")

[109] See Exhibits 2, 3, 17, and 19.

[110] See my June 3, 2005, email to Ribelin, Foster, Eichner, Conroy, Glascoe, Miller, Hanson and Kreitman, Ex. 30. This email incorrectly stated that Mack left Morgan Stanley in late July 2001. It was corrected by my email of June 6 (Ex. 26); Mack actually left in March 2001.

Hanson replied twice. In the first, he said: "Mack is another bad guy (in my view)."[111] In the second, Hanson observed:

> They may feel they have some enterprise exposure and want to avoid an indictment of the firm by bringing in an outsider to give the appearance that things are cleaned up (audrey [sic] did this before on the case I wordked [sic]) or they may be bringing him in so they are all peeing out of the same tent so to speak.[112]

Taking Mack's Testimony as Soon as Possible Was Consistent with Standard SEC Practice

In my July 27, 2005, email to Kreitman and Berger, I also noted:

> I also believe Mack's testimony should have been taken promptly for the same reason that staff normally takes early testimony of suspected participants in an insider trading investigation—to pin them down. This is particularly true here because CFSB and Morgan Stanley are still producing e-mails. Further Morgan Stanley will be friendly because Mack is now its CEO. CSFB will be friendly to Mack because Gary Lynch, who is going to Morgan Stanley in a couple of months to join Mack, controls the CSFB production responsive to our subpoena. Further delay allows Mack to concoct a story that is consistent with the information contained in the e-mails. On the other hand, if he did not provide information, that also may become clear. As discussed in my June 28 e-mail to Mark (Exhibit 10), this would allow us to focus on other possible sources for the tip.[113]

Pinning down the suspected tipper or tippee allows the case to proceed in either of two directions: prove the insider trading case or prove the tipper or tippee gave false testimony. For example, Martha Stewart was not convicted of insider trading; she was convicted of lying to federal officers. This principle is taught at Enforcement training for new staff. It is constantly repeated by senior staff. It guided the PCM investigation until Mack became a suspect. This guideline—taking the testimony to pin down the suspect—was turned on its head for the Mack testimony. In effect, my superiors required the case against Mack be established before his testimony could be taken.[114]

How the Mack Investigation Was Halted so He Could Become Morgan Stanley's CEO

As discussed above, the investigation of the GE-Heller matter made significant progress during May and the first half of June 2005. On June 14, Hanson and Kreitman authorized me to present the GE-Heller matter, including Mack's and Samberg's roles as the possible tipper and tippee, to the FBI and a federal prosecutor, which I did with other staff the next day.[115] Shortly

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[111] See June 3, 2005, email from Hanson to me, Ex. 42.

[112] See June 3, 2005, email from Hanson to me, Ex. 52.

[113] Ex. 19.

[114] Kreitman required proof exist Mack "went over the wall," meaning he had knowledge GE intended to acquire Heller before he could be asked if and when he had such knowledge. See discussion *infra* p 33.

[115] The index to the notebook, Ex. 4, also served as an outline for my presentation to Hanson and Kreitman on June 14, 2005, and to the FBI agents and U.S. Attorney on June 15, 2005.

after June 17, Hanson gave my 2004-2005 performance a positive evaluation based on my handling of the GE-Heller investigation.[116]

All that was about to change: The investigation of GE-Heller and my career with the SEC would hit roadblock in the last week of June 2005. On approximately June 23, 2005, in a face-to-face meeting, Hanson told me that it would be difficult to obtain authorization for the issuance of a subpoena to Mack *because Mack had powerful political connections* and Kreitman "would have to make the call."[117] Hanson repeated his statement regarding Mack's political connections in a meeting with Kreitman later that same week and again in a meeting between the two of us on August 3. I confirmed Hanson's statements about Mack's "political connections" in my emails of July 27, 2005, to Kreitman and Berger,[118] August 4, 2005, to Hanson[119] and August 24, 2005, to Hanson.[120] By his email of August 24, Hanson admitted telling me about Mack's "political clout" in response to my request to issue subpoenas for Mack's testimony and his documents.[121] By email of August 4, Hanson admitted telling me that Mack's attorneys had "juice."[122]

But another event in late June 2005 tells even more why my efforts to subpoena Mack would fail. On June 23, three days after I first proposed the Mack subpoenas be issued, The Wall Street Journal announced that Morgan Stanley "has weighed reconsidering former Morgan president John Mack as a candidate for [its] chief executive officer."[123] That same day, Eric Dinallo ("Dinallo"), head of Morgan Stanley's regulatory compliance group, phoned me.[124] Dinallo confirmed that Morgan Stanley was considering Mack for its CEO and, in connection with that possibility, asked if Enforcement was seriously considering Mack as a suspect in the PCM investigation. Dinallo explained that the prospect of such an action against Mack could affect Morgan Stanley's decision whether to rehire him as its CEO. I responded that I could make no statement on the subject, but would inform my supervisors of his inquiry.

Following the conversation, I informed Hanson and Kreitman of Dinallo's question. In my presence, Kreitman called Dinallo and told him that he was following up on Dinallo's call to me. Dinallo repeated the statement he made to me. Following the call, Kreitman stated in my presence that we should tell Morgan Stanley the SEC was considering an action against Mack since that action could adversely affect the value of Morgan Stanley stock, a publicly held company. But Kreitman said he would first discuss the issue with Associate Director Berger

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[116] My evaluation of my own work, referred to by the SEC as a "contribution statement" was forwarded to Hanson by my email on June 17, 2005, attached as Ex. 37. After receiving my contribution statement, Hanson did his own evaluation of my performance, Ex. 38, and forwarded it to the Compensation Committee. The date of Hanson's evaluation and his transmittal date to the Compensation Committee are unknown because the SEC has refused to produce these records.

[117] This is my best recollection. However, it is possible this communication occurred as early as June 21. This discussion was memorialized in my email of July 27, 2005, Ex. 19, my email of August 4, 2005, and August 24, 2005, Ex. 17, as well as Hanson's email of August 24, 2005, Ex. 23.

[118] See Ex. 19.

[119] See Ex. 22.

[120] See Ex. 23.

[121] *Id.*

[122] See Ex. 24.

[123] Ann Davis, *Morgan Stanley May Reconsider Mack for CEO*, WALL ST. J., June 23, 2005, at C1.

[124] This phone call could have occurred on June 27, though June 23 is my best recollection of the date.

("Berger"). That same day, Kreitman discussed Dinallo's question with Berger by speaker phone in my presence. Kreitman first informed Berger of the call from Dinallo. Then, the following exchange took place between Kreitman and Berger almost in these words:

> Kreitman: I think we will likely file against Mack and...
> Berger (cutting in): I don't think we are going to file and nothing should be said to Morgan Stanley.

Following the Kreitman-Berger call, there was an abrupt shift in the way the investigation was handled; that shift related exclusively to Mack. The usual routines and protocols went out the window. The next day, June 24, Hanson met alone with Berger on the evolving Mack controversy. Although Hanson initially invited Ribelin and me to the meeting, Berger told Hanson at the last moment that the meeting would involve only the two of them. Ribelin and I normally had been included in these meetings, since we were most familiar with the evidence and I had primary responsibility for the investigation.[125] The following Monday, June 27, Hanson and Kreitman also met privately to discuss my request to issue the Mack subpoenas.

On June 27, I learned that Mack-Samberg emails, which I had subpoenaed from Morgan Stanley, had been delivered directly to the Director of Enforcement, Linda Thomsen ("Thomsen"). Neither I nor other staff had heard of this happening before. Indeed, the subpoena explicitly stated that the documents were to be delivered to me. When I picked up the emails from Director Thomsen's office, she also gave me a fax cover letter from Mary Jo White ("White"), former U.S. Attorney in New York. The fax indicated that White was forwarding the Mack-Samberg emails to Thomsen as a follow up to her conversation with Thomsen on the same subject.[126] I had numerous contacts with other Morgan Stanley counsel, but never with White. It appeared that White had been retained by Morgan Stanley to deal directly with Director Thomsen about the Mack investigation. It is the usual protocol for a defense counsel to deal with the staff attorney first and then go further up the chain of command if he or she were dissatisfied with a decision by the staff attorney. My dealings with Morgan Stanley attorneys had always been cordial and none had expressed a desire to speak with my supervisors. White simply started at the top.

The emails that White had delivered to Thomsen were only one of the two classes of emails I had subpoenaed from Morgan Stanley: email exchanges between Samberg and Mack before Mack left Morgan Stanley in March 2001.[127] These exchanges took place before Morgan Stanley became GE's consultant in May 2001 on the Heller acquisition. Accordingly, no one expected these emails to have even the most subtle clues regarding the possible tip from Mack to Samberg. Rather, this class of emails were sought to provide background information on the Mack-Samberg relationship, e.g., how often they exchanged trading tips, and to confirm whether PCM had produced all Mack-Samberg email exchanges for this time period, which we doubted.[128]

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[125] See Ex. 19.
[126] *Id.*
[127] See Ex. 47.
[128] See *supra* note 87.

The other class of emails sought, Mack's communications with Morgan Stanley staff after he left, had more relevance to the possible flow of information. Again, no one expected to find a smoking gun in these emails. As discussed below, smoking guns are rarely found in insider trading cases, particularly when the suspected tipper and tippee are highly sophisticated financial professionals.[129] Rather, these emails might identify Morgan Stanley employees with whom Mack was still communicating *after* he left Morgan Stanley. That lead could open a new path to investigate, e.g., whether the employee was on the acquisition team, had a friend on the team, or had any other reason to know about the acquisition. White produced no emails of this class, at least none that Thomsen turned over to me.

When I picked up the emails from Thomsen, she walked out of her office, handed them to me, and made this comment: "they say what they say." I turned the emails over to an intern to review and compare with those produced by PCM; she reported back, as I recall, that there were a few new emails. This was relevant to our growing belief that PCM had withheld or destroyed 2001 Samberg emails. As expected, however, the emails merely provided background on the Samberg-Mack relationship.

In this context, Director Thomsen's comment—"they say what they say"—was troubling. As discussed above, the emails said very little. Had White suggested to Thomsen that these emails somehow demonstrated Mack had not provided the tip to Samberg? Was Thomsen going along with it? Did Thomsen think we were relying on these emails to prove Mack had tipped Samberg? To begin with, our primary theory was the tip had flowed from CSFB to Mack and then to Samberg. Over the next couple of days, as my supervisors continued to block the Mack subpoena, my concern grew. Had Thomsen or Berger directed Kreitman to block the Mack subpoena based on emails White had delivered to Thomsen? If so, why was Thomsen making decisions that could unravel the investigation without a complete briefing?

By email of June 29, 2005, I informed Kreitman that the most senior Enforcement staff had assumed unusual roles in relation to the Mack investigation: (1) Director Thomsen was receiving Mack-Samberg emails responsive to the subpoena I had served on Morgan Stanley; and (2) senior staff (who had little knowledge of the investigation) was dealing directly with Morgan Stanley's counsel. My email read:

> I have been informed by Fiona Phillips, who represents Morgan Stanley, that a CD is expected here this afternoon. When I told them [her] that it could be delivered tomorrow, since the mailroom would be closed, she insisted that it be delivered today because "someone here was expecting it." That person is not me. *I also understand that other documents from Morgan Stanley were sent directly to Linda Thompson [sic] and that there have been discussions between senior staff and counsel for Morgan Stanley. As I have told Bob, and stated in my memos, the most logical path of the information is from CSFB to Mack to Samberg* (emphasis added).[130]

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[129] Newkirk *infra* note 196.

[130] See Attachment 15 to Ex. 19.

Incidentally, Kreitman did not respond to this email.

Director Thomsen had reason to listen when White called her in late June to discuss the possible SEC insider trading investigation of Mack. At that time, Thomsen's job was on the line. As Director of Enforcement, she served "at the pleasure" of the SEC Chairman. In late June 2005, the SEC was about to change its Chairman.[131] President Bush had nominated Christopher Cox, who was widely perceived to be far more business friendly than his predecessor.[132] The financial media openly speculated that Thomsen could lose her job.[133] This new reality apparently had some effect on Thomsen; she told Newsweek in June 2005 that Enforcement would have to adapt to the new leadership.[134] It was in this environment that White called Thomsen to discuss—and more than likely try to discourage—the insider trading investigation of Mack, the Wall Street titan and "elite" Bush fund raiser. Incidentally, Hanson identified White as one tentacle that Mack could use in exercising his "political clout."[135]

On June 27 and June 28, I sent two emails to Kreitman explaining in detail (1) the evidence indicating Samberg had acted on material nonpublic information in directing the trades in GE and Heller stocks[136] and (2) why subpoenas for Mack's testimony and related records were the most logical next steps in the investigation.[137] On June 27, I also prepared and delivered to Kreitman a spreadsheet summarizing Mack's ties to fifteen PCM hedge funds[138] and directed an intern to prepare and deliver another spreadsheet summarizing other key Mack-Samberg contacts and business relationships.[139] These emails and spreadsheets supplemented emails to Hanson earlier in June indicating that Mack was the likely tipper.[140]

On June 28 and 29, I spoke privately with Kreitman regarding the issuance of the Mack subpoenas. Kreitman showed no interest in the facts summarized in the emails and spreadsheets supporting my belief that the Mack subpoenas should be issued. Nor would he allow me to summarize the facts in those emails and spreadsheets. He angrily refused to allow the subpoenas to be issued, but did not explain the reasons for his decision. He provided no guidelines under

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[131] Susan Harrigan, *Mutual Fund Rule Gets Nod; SEC Revote Reaffirms Measure Requiring Directors Have No Ties to Firms Managing Investors' Accounts*, NEWSWEEK, June 30, 2005, at 52 ("To succeed Donaldson, President George W. Bush has appointed Rep. Christopher Cox (R-Calif.), who has been perceived as friendly to business.")

[132] *Id.*

[133] *Departures May Leave a Political Imbalance*, FIN. TIMES, June 29, 2005, Comment at 15 ("Cox, if approved by the Senate, would have to decide whether to retain Linda Chatham Thomsen as SEC enforcement director."); see also: Carrie Johnson, *For Chief, A Chance To Shape the SEC; Cox May Choose Division Heads*, WASH. POST, June 7, 2005, at D1 ("Whether Cox retains or replaces her will be watched closely as a clue to his commitment to stringent enforcement.")

[134] Karen Tumulty and Mike Allen, *His Search for a New Groove*, TIME, December 19, 2005, at 38.

[135] By my email of August 24 to Hanson, I confirmed that Hanson had stated "several times that the problem in taking Mack's exam is his political clout, e.g., all the people that Mary Jo White can contact with a phone call." See Exhibit 22. Hanson responded on the same day: "Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony." See Ex. 23.

[136] See Ex. 2.

[137] See Ex. 3.

[138] See Attachment 11 to Ex. 19.

[139] I do not have a copy of this spreadsheet. However, an edited portion of that spreadsheet limited to the known email communications between Mack and Samberg is enclosed as attachment 12 to Ex. 19.

[140] See Exhibits 26 and 27.

what circumstances he would authorize the issuance of the subpoenas. By email of June 29, I confirmed Kreitman's refusal to allow the Mack subpoenas to be issued and also noted his decision would have a significantly adverse impact on the investigation. That email read in part:

> As you know, I have asked to issue a subpoena to CSFB and to take the testimony of John Mack in connection with Samberg's $80 million trades in GE and Heller shortly before the public announcement of the GE's acquisition of Heller. I suggested in my e-mail to you of June 27 in summary fashion why Mack was a logical source of the tip and also suggested in my memo of June 28 that this was the next logical step in this investigation....
>
> Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation....[141]

As stated below, Kreitman did not respond to my June 29 email for almost four weeks. This was out of character for him, as it was his practice to promptly reply to emails from his subordinates. He also never replied to my lengthy emails of June 27 (nine pages) and June 28 (four pages) describing why Mack's testimony should be taken.

I had issued over ninety subpoenas in the course of the PCM investigation. With the exception of the delivery of the Mack-Samberg emails by Morgan Stanley's counsel to Director Thomsen, defense counsel always sent the responsive documents to me in accordance with the explicit instructions in the subpoena. Likewise, I had spoken directly with all defense counsel regarding their clients' compliance with these subpoenas. No controversy had arisen during my discussions with Morgan Stanley's counsel regarding the production of documents pursuant to the Commission subpoenas.

As mentioned above, it was even more unusual that Morgan Stanley brought in a high powered attorney, Mary Jo White, to discuss a subpoena production with Enforcement's highest official, Director Thomsen. Thomsen and White surely discussed something more important. The likely subject of their call was Morgan Stanley's dilemma; Mack could not step in as Morgan Stanley's new CEO if he was going to be pulled into a messy SEC insider trading investigation. Morgan Stanley's chief compliance officer called me a day or two before to discuss the same subject. No one knows what White and Thomsen discussed except them. But two events the next week give a strong clue: Mack stepped back in as Morgan Stanley's CEO; Kreitman barred the service of any subpoena on Mack.

The evidence indicated Kreitman had executed the decisions, but had not made them. His handling of the Mack controversy was out of character for him, e.g., giving Mack favored treatment, directing me to seek a criminal investigation and then blocking the issuance of an administrative subpoena, refusing to review my emails detailing the reasons Mack's testimony was necessary, failing to respond to multiple emails, and doing much of this with anger. It was obvious to me that he was under pressure from above. Berger's handling of the Dinallo question suggested that the pressure was coming at least from his level. The unprecedented delivery of the

[141] See Ex. 28.

Mack-Samberg emails to Director Thomsen and her discussion with Mary Jo White suggest Director Thomsen had applied the pressure. The unknown is whether the pressure had originated with Director Thomsen or was merely passing through her from a higher level within the SEC or outside the SEC from Mack's or Morgan Stanley's "powerful political contacts."

On June 30, one week after Dinallo's call, Morgan Stanley hired Mack as its CEO. Morgan Stanley's concern that Mack was under investigation, as expressed by Dinallo to Kreitman and me one week earlier, had been assuaged. The only way Mack could be insulated from an SEC investigation was if senior SEC officials had decided that he would not be investigated. *The only way Morgan Stanley could be comfortable that Mack would not be investigated by the SEC is if a senior SEC official had given this assurance.*

On the same morning Mack stepped back in as Morgan Stanley's CEO, June 30, 2005, I tendered my resignation, effective September 30, 2005. I had returned to the practice of law in September 2004 to perform public service with the SEC. I believed, and still do, that my supervisors' decision blocking the Mack subpoena was done as a favor for Mack and Morgan Stanley and, as such, corrupted the SEC's mission. Trying to get my supervisors to adhere to the SEC's mission was not why I had come to the SEC. I could not see how I could carry out my duties as a federal officer in the PCM investigation and yet accept the decision of my supervisors to give Mack favored treatment.

Over the next four weeks, other SEC staff encouraged me to withdraw my resignation and try to change the course of the PCM investigation. One colleague suggested that my departure guaranteed the GE-Heller investigation would end. Additionally, over the next four weeks, I continued to find more evidence suggesting that Mack was the tipper. By late July, I decided to with draw my resignation. I would challenge my supervisors' decision giving Mack favored treatment at ever higher levels of the SEC until it was reversed.[142] To that end, on July 20 or July 21, I met with Berger and told him that Hanson had informed me the Mack subpoena had been blocked because of Mack's powerful political connections. On July 27, I sent Berger two emails. One told him I was withdrawing my resignation.[143] The other informed him why I believed Hanson had blocked the Mack subpoena: Mack's powerful political connections.[144]

The apparent favor from senior Enforcement officials to Mack and Morgan Stanley raises another troubling question: Did any of the senior officials who blocked the Mack testimony receive anything in return? That question shifts the focus to former Associate Director Berger. The most obvious *internal* intervention in the Mack investigation came from Berger. He was the point person who cut off Kreitman in mid-sentence to say the Mack investigation was going nowhere. Kreitman then reversed his support for the Mack investigation. The most obvious *external* intervention in stopping the Mack investigation came from Mary Jo White of Debevoise & Plimpton, attorneys for Morgan Stanley. In bypassing SEC protocol, she went directly to

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[142] Federal employees are required to "disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. 2635.101.

[143] I spoke with Berger that same day and he accepted the withdrawal of my resignation. See my July 27, 2005, email to Berger, Ex. 53.

[144] Ex. 19.

Director Thomsen, who, to the best of my knowledge, had never been briefed on the GE-Heller investigation and Mack's possible role as the tipper.

In May 2006, White announced Berger would start in June with Debevoise & Plimpton ("D&B") and work on securities cases, enforcement and white-collar criminal defense matters. *She said Berger's wealth of experience at the SEC "will be a tremendous asset to our clients."*[145] Some obvious questions must be asked about Berger's courtship with D&P. Had Berger discussed his future plans with any D&B attorney when he initialed my termination notice for seeking to issue a subpoena to the new CEO of Morgan Stanley, a D&B client? Did May Jo White participate in recruiting Berger to D&B? When did any D&B attorney and Berger first discuss the possibility that Berger would join D&B? Was Berger a "tremendous asset" to a D&P client before he left the SEC? Did Berger recuse himself from the PCM investigation after he began discussions with D&B about his personal plans?

My Supervisors Offered Spurious, Conflicting and Shifting Reasons for Stopping the Mack Investigation.

After senior Enforcement officials decided to halt the Mack investigation, they still had to communicate their decision to lower staff. And then there was also the sticky question of the reason. One option was to tell lower staff the truth. That assignment would likely have gone to Kreitman. His email would have read something like this: "Director Thomsen and Associate Director Berger have made a final decision to drop the investigation of John Mack for reasons they do not wish to share. Anyone who presses for those reasons will be fired." Enforcement officials wisely rejected the truth option. They did, however, come up with something similar: give a reason that sounds like the truth. This broadened the options.

Does Mack Have a Motive?

Kreitman came up with the first one on June 27: did Mack profit from Samberg's trades? I said yes, explaining Samberg had allocated profits from the GE-Heller trading to at least one of the hedge funds in which Mack had invested.[146] I also told Kreitman that Samberg had returned Mack's favor, assuming Mack had tipped Samberg, with numerous favors of his own to Mack.[147] Two days later, I sent Kreitman an email describing Samberg's favors to Mack.[148] Those favors were also addressed in my emails of July 27 and August 4.[149]

The issue of motive had never been raised by any of my supervisors in the PCM investigation as a *reason not to issue a subpoena*. Further, under established precedent, the friendship between Mack and Samberg was alone sufficient to establish illegal insider trading if Mack had tipped Samberg.[150] The hunt had begun: senior Enforcement officials were looking for a reason—legitimate or not—to block the Mack subpoena.

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[145] *SEC Associate Enforcement Director Stepping Down*, DOW JONES NEWS SERVICE, May 18, 2006.
[146] See Ex. 2.
[147] The favors Samberg did for Mack are described above at pp. 18-19.
[148] See Ex. 28.
[149] See Exhibits 17 and 19.
[150] See *supra* note 108.

You Have Not Stated Enough Specificity to Take Mack's Testimony

Four weeks passed before Kreitman would raise another objection to Mack's testimony. By his July 25 email, Kreitman said he wanted more "specificity" before he would approve the subpoena for Mack.[151] This email was out of character for Kreitman. First, Kreitman usually responded within hours to emails from his subordinate staff. His July 25 email was a reply to my email of June 29, almost four weeks earlier. Second, Kreitman's email ignored the "specificity" set forth in the emails and spreadsheets he received on June 27 and June 28.[152]

I replied to Kreitman, and also Berger, on July 27 with an eight-page email and fifteen attached exhibits. The exhibits were emails and spreadsheets which I had previously provided to Hanson or Kreitman.[153] Referencing these exhibits, the letter addressed every contention in Kreitman's July 25 email. My email first addressed the four-week delay in Kreitman's response. I suggested that Kreitman's email had been prompted by my meeting with Associate Director Berger a few days earlier.

My July 27 email began:

> This replies to Mark's e-mail of July 25, which in turn replied to mine of June 28 (attachment 13).[154] I wrote and sent my e-mail immediately after a heated discussion with Mark on June 28, memorializing what had transpired. I do not understand why it would take four weeks to respond. I am also copying Paul because the timing of Mark's e-mail suggests it was triggered by my conversation with Paul on the same points late last week.

I told Berger during our meeting the prior week that Hanson had blocked the issuance of subpoenas for Mack's testimony and key documents because Mack had powerful political connections.

My July 27 email went on to point out that a suspected violator of the federal securities laws (Mack) was getting special treatment because of his powerful political connections and that "treating Mack differently is [not] consistent with the Commission's mission, at least as I understand it...." The email reads in part as follows:

> I had different and more troubling input why it was difficult to move ahead with the second CSFB subpoena and the Mack testimony. I sent two e-mails to Bob during the week of June 20 (see attachments 3 and 8) proposing that we proceed with the Mack testimony and broaden the CSFB subpoena. When I did not hear back from Bob, I spoke with him directly about these proposals. Bob told me 1) that these decisions were for Mark to make and 2) *it would be an uphill*

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[151] See Ex. 19.

[152] *Id.*

[153] See Ex. 19. The spreadsheet, attachment 12, was an edited version of a portion of the spreadsheet previously provided to Kreitman. I do not have the spreadsheet itself.

[154] The actual date of my email was June 29. It is attached as Ex. 28.

> *battle because Mack had powerful political connections. Bob also mentioned this concern during a meeting with Mark and me* (emphasis added). Bob's comment about Mack's political influence became more real when I learned on June 27 that documents I had subpoenaed from Morgan Stanley were faxed by Mary Jo White (who had never represented anyone in the investigation) directly to Linda Thompson (see attachment 15), before Morgan Stanley produced them in the investigation. On the preceding Friday, June 24, Bob also met privately with Paul about the investigation I was handling. Likewise, Mark and Bob did not invite me to participate in the meeting on June 27 when they discussed Mack's possible testimony. This combination of events suggests to me that the issue whether Mack's testimony would be taken was being handled differently than the same issue for other witnesses in this investigation and different from the same issue in other investigations. Further, I do not believe that treating Mack differently is consistent with the Commission's mission, at least as I understand it.[155]

In sum, I informed Berger on two occasions in less than one week that Hanson had blocked Mack subpoenas because of his powerful political connections. Blocking Mack's testimony for this reason violated multiple provisions of the Code of Federal Regulations which govern the operations of the SEC.[156] Yet, Berger took no action whatsoever. He apparently did not even speak with Hanson because, exactly one week after my July 27 email, Hanson repeated the comments about Mack's political comments, which he first made on June 23.

We Need another Memo Before We Can Decide to Authorize Mack Subpoena

At a face-to-face meeting with Hanson on August 3, I questioned Hanson and Kreitman's decision to block the Mack subpoenas. At that meeting, Hanson again stated that it would be very difficult to take Mack's testimony because of his political influence. By my email of August 4, I confirmed further details of the exchange with Hanson on August 3:

> Second, I told you that the decision not to take Mack's testimony because of his powerful political connections was the event that triggered my decision [to leave the Commission] ...We then discussed at some length what standard had to be met to take Mack's testimony. You told me that Mack was "an industry captain," that he had powerful contacts, that Mary Jo White, Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call Linda about the examination. I told you I did not believe we should set a higher standard for a political captain than anyone else.[157]

In a separate email on August 4, I confirmed and continued the discussion from the night before:

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[155] Ex. 19.

[156] 17 CFR 200.55 17 CFR 200.58, 17 CFR 200.61, 17 CFR 200.64, 17 CFR 200.735-2, and 17 CFR 200.51. See *infra* at p. 38.

[157] See Ex. 22.

> Bob:
> I mentioned last night that Ferdinand Pecora was chief counsel for the Senate Committee that drafted the 1933 and 1934 Acts, including the key operative language of Section 10(b) . .
>
> When the SEC declines to question "industry captains," when an investigation suggests it is the next logical step, we are granting them a pass to play the trading game by their own rules. We do the same when we set artificially high barriers to question them that do not exist for others, e.g., don't question them about going over the wall until we proved they have already made the trip.
>
> I don't think Pecora was suggesting that regulatory scrutiny be delayed until we have another market collapse. I do not think he would have delayed a heartbeat before taking John Mack's testimony on the record in this matter. Mack had multiple motives, Samberg's trust, contact with Samberg at the key moment, and two possible sources for the tip. He should be asked the obvious questions.[158]

In his next email, Hanson essentially bypassed my characterization of his comments about Mack's political influence, but he did not deny them. He only admitted saying: "Mack's counsel will have 'juice' as I described last night—meaning that they may reach out to Paul and Linda (and possibly others)."[159] He seemed to imply that his other comments, which he did not mention, somehow related to keeping Thomsen and Berger informed that we might take Mack's testimony. This made no sense. Berger and Thomsen had been involved in the controversy over Mack's testimony since late June. Further, if we decided to go that route, there was plenty of time to inform both before the subpoenas hit the fax machine.

Several weeks later, he and I had another email exchange on "Mack's political clout." Here are our email exchanges discussing Hanson's comments to me:

Aguirre: "First, before and after the Mack decision, you have told several times that the problem in taking Mack's exam is his political clout, e.g., all the people that Mary Jo White can contact with a phone call."[160]

Hanson: "Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony."[161]

Aguirre: "Bob, this is spin. You told me it would be tough to take Mack's testimony because he has political clout. An artificially high barrier has been set for his exam. I do not think this is proper. Doing so clashes with the SEC's mission. It also stops me from doing my job as a federal officer."[162]

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[158] See Ex. 18.
[159] See Ex. 24.
[160] See my August 24, 2005, email to Hanson, Ex. 23.
[161] See Ex. 23.
[162] *Id.*

The "reason" Hanson gave in his email for telling me about "Mack's political clout"—"to keep Paul and possibly Linda in the loop on the testimony"—makes no sense. When Hanson spoke about Mack's political influence during our meeting on August 3, as confirmed by my August 4 email, both Paul and Linda had been making decisions relating to Mack's testimony for six weeks. They were both clearly "in the loop."[163]

This exchange resulted in Hanson directing me to prepare another memorandum explaining why Mack's testimony should be taken. Consequently I prepared and sent another lengthy email to Hanson and later to Berger explaining why the Mack testimony was the next logical step.[164]

We'll Check Your Facts and Then Decide whether to Authorize Mack's Testimony

After Hanson repeated his comments on August 3 about Mack's political influence, it was clear Berger had done nothing. I therefore decided to inform Director Thomsen of Mack's preferential treatment, and, if she failed to act, to inform the Commissioners. But first a little background is necessary to place in context my comments to Director Thomsen.

As discussed above, Foster had worked on the PCM investigation since I contacted him in October, just after his presentation to incoming staff how to conduct an insider trading investigation. He retired from the SEC on June 30, 2005. At Foster's going away party on July 11, I was present when Foster told Director Thomsen that the PCM investigation was the most important matter he had worked on during his 30 years with Enforcement. Later that evening, Foster also suggested to me that I speak directly with Thomsen regarding the investigation.

Consequently, on August 4, 2005, I sent the following email to Director Thomsen:

> Subject: Hilton's comment to you
>
> Do you have an open door policy?
> If so, do you recall Hilton Foster's comment to you about the most important case he handled in his 30 years with the Commission? He wanted me to talk to you about it. It was nearly killed 5 months ago[165] and is now moving in circles.
>
> It could change the financial markets–make them a little more hospital [hospitable] for investors, small or big, who do their home work rather than buy information with favors.[166]

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[163] See discussion *supra* pp. 23-24.

[164] Ex. 17.

[165] This refers to a decision by Kreitman in early February 2005, less than a month after staff had obtained subpoena power and before any subpoenas had been issued. Kreitman directed that the PCM investigation be narrowed to two or three matters. Kreitman had expressed his approval a few days before when the investigation was increased to include seventeen referrals. Kreitman later withdrew the directive in March. Kreitman implied the directive had come from Berger. It came approximately two weeks after an influential attorney representing PCM met with Enforcement Director Steven Cutler.

[166] See Ex. 31.

Immediately after I sent the above email to Director Thomsen, Hanson took a more flexible position on the Mack subpoenas. His new position was this: he and I would discuss whether to issue the Mack subpoenas in September after we both returned from vacation; the facts in my latest email regarding Mack would be "nailed down."[167] Based on Hanson's new flexibility, I postponed the meeting with Director Thomsen. My email to the Director read in part:

> The day following my e-mail to you, my Branch Chief said he would like to discuss in September, when all are back from vacation, the specific concern that prompted my e-mail to you. I therefore believe it makes more sense to delay discussing this matter with you until September to see if it works itself out.[168]

Must Show that Mack Went Over the Wall

Two weeks after Hanson expressed his new flexibility on the Mack testimony, Kreitman reverted back to the hard line on taking Mack's testimony. He created a new requirement for the issuance of a subpoena in an insider trading case: proof that the suspect was "brought over the wall" before he could be subpoenaed.[169] Kreitman never suggested that this precondition for any other suspected tipper in the PCM investigation, including those, like Mack, who were suspected of tipping a PCM portfolio manager of a pending acquisition. I could find no one at the SEC that had ever heard of this as a precondition to the issuance of a subpoena. No federal court case or SEC administrative case ever held that the government had to prove that a suspected tipper "was brought over the wall" before a judgment could be entered against him or her for insider trading.

The phrase does have meaning in the financial industry lexicon. It applies to someone in a securities firm who is "brought over the wall" restricting access to non-public, material information, sometimes referred to as a Chinese wall. For example, those working on an acquisition might bring an analyst to explain an esoteric point about a product the acquired company manufactures. In this process, the analyst has learned material nonpublic information, the acquisition is pending. If he trades on this information or tips another, he violates the securities laws. But the analyst could also violate the securities laws if he obtained the same information from some other source, e.g., he sneaked a peak at a document, and then traded on it or tipped another. For no rational reason, Kreitman would only allow the Mack subpoena to be issued if he learned about the Heller acquisition by being "brought over the wall."

Kreitman's requirement that I establish to his satisfaction that Mack had "been brought over the wall" set a higher standard for an SEC administrative subpoena than an appellate court applied for affirming a criminal conviction of insider trading. The "brought over the wall" requirement meant there had to be proof that someone had actually told Mack about the acquisition. The First Circuit set a lower standard in affirming an insider trading conviction with these words:

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[167] See August 5, 2005, email from Hanson to me, Ex. 44. The email string is included.
[168] See Ex. 32.
[169] See Ex. 33.

> The defendant argues that proof of "opportunity" or "access" to material, nonpublic information is not the same as proving actual possession. That is correct, but does not carry the day. While the defendant is correct that opportunity alone does not constitute proof of possession, opportunity in combination with circumstantial evidence of a well-timed and well-orchestrated sequence of events, culminating with successful stock trades, *creates a compelling inference of possession by the tipper* (emphasis added).[170]

Kreitman's use of "over the wall" in the case of Mack was a Catch-22. Stripped to its essence, it meant this: before any evidence could be obtained from Mack that might give a clue he knew about the Heller acquisition, other evidence had to prove Mack knew about the Heller acquisition when he spoke with Samberg on June 29. That same issue—whether Mack knew about the Heller acquisition—was also the primary factual issue in the investigation. If Mack knew about the Heller acquisition, the case came together. He would have called Samberg on June 29 *with knowledge*. It would explain why Samberg began the next trading day to accumulate more Heller stock than anyone else in the nation and wanted to buy even more. It would explain why he shorted GE the same way. All the other elements of the tipper's profile would support finding that Mack was in fact the tipper.

Normally, Mack's knowledge of the tip would be proved by circumstantial evidence.[171] The first step would be to subpoena him and his records, e.g., emails, personal calendar and phone records. But that was where the Kreitman catch-22 fit in. No subpoena could be issued unless *other* evidence proved Mack *already* knew about the Heller acquisition. That was a tall order. The records maintained by CS were in Switzerland, beyond the reach of SEC subpoenas.[172] The only other records, if they existed, were under the control of Mack's close ally, Gary Lynch, General Counsel of CSFB, who would soon join Mack at Morgan Stanley for a $13 million pay package.[173] Lynch's subordinate, another CSFB attorney, believed CSFB had no records relating to Mack's meetings with CSFB's CFO in late June and the second week of July. *Kreitman's Catch-22 was also a checkmate*. That was exactly what it was intended to be.

In any case, Mack was *not* employed by a securities firm on the date he was suspected of tipping Mack. So even if Kreitman's Catch-22 was accepted, it had no application to Mack. When I explained the "over the wall" concept had no application to Mack's situation, Kreitman seemed to drop the issue.[174] Kreitman offered no further excuse why Mack's testimony should not be taken before he fired me. However, in late August, Hanson picked up this theme again.

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[170] *United States v. Larrabee*, 240 F.3d 18, 21 (1st Cir. 2001).

[171] See *infra* p. 39.

[172] See Ex. 21.

[173] See Ex. 19 and Ex. 47.

[174] *Id.* I could find no one in Enforcement that had ever heard of the theory that the "brought over the wall" concept had any application to the issuance of a subpoena in an insider trading case.

"Everyone Feels We Will Take Mack's Testimony at Some Point"

By August 24, Hanson had returned from vacation and was also backing away from his earlier decision to reopen the question of Mack's testimony.[175] He did, however, concede: "I believe that everyone feels we will take Mack's testimony at some point– the question is when."[176] The testimony was not taken until August 1, 2006, and then only after the matter had become public and two key statutes of limitations had expired.[177]

Hanson and I never met to discuss Mack's testimony, as he suggested on August 5. Hanson left for vacation that day. When he returned on August 22, I was on vacation, scheduled to return on September 6. On September 1, 2005, Kreitman and Hanson called me in California to say my employment would terminate the next day or I could resign. On September 1, Thomsen sent me her termination notice, initialed by Berger. On September 2, I sent a letter to each Commissioner informing them of the favored treatment senior Enforcement staff had given Mack.[178]

The evidence suggests that Hanson's new flexibility on August 5 was engineered to stop my disclosures to higher and higher levels of the SEC until Enforcement officials could figure how to camouflage their decision to fire me. Contrary to Hanson's statement, the facts indicating Mack tipped PCM were never vetted. Neither Hanson, nor Kreitman, nor Berger ever responded to my August 4 email, which again detailed the reasons to take Mack's testimony. By the second half of August, both Kreitman and Hanson had reverted back to a hard line on the Mack subpoenas.[179] Consequently, I decided to take the propriety of Mack's special treatment beyond the SEC. On August 29, three days before I was fired, I contacted the Disclosure Unit of the Office of Special Counsel to discuss the filing of a complaint arising out of the PCM investigation.[180]

Senior SEC Officials Gave My Performance High Marks, until I Tried to Investigate Mack; Then They Fired Me.

The SEC's Form 50-B (Personnel Action) records the SEC's decision on August 21, 2005, to approve a two-step merit increase based on my performance.[181] Director Thomsen's notice of September 1 terminated my employment eleven days later. In between these dates, I was on vacation. The obvious question: How did my performance warrant a two-step pay increase, yet also require the SEC to fire me? The SEC has offered no explanation. To the contrary, it has done its best to conceal those facts. As discussed next, I believe this mystery is solved with two words: John Mack.

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[175] See Ex. 23.
[176] *Id.*
[177] See *infra* p.41-42.
[178] See Ex. 34
[179] See Exhibits 17 and 33.
[180] I discussed with Office of Special Counsel attorney Mathew Glover whether nonpublic documents relating to an ongoing SEC investigation could be filed with a whistleblower complaint.
[181] See Ex. 35.

I started work with the SEC on September 7, 2004. On June 1, 2005, Branch Chief Hanson and Assistant Director Kreitman did my 2004-2005 performance evaluation. Kreitman completed SEC Form 2494 regarding my "performance assessment" in relation to four categories of "Critical Elements and Acceptable Standards."[182] Kreitman had the option of checking one of two boxes ("Acceptable" or "Unacceptable") for each of the four categories: (1) "Knowledge of Field or Occupation," (2) "Planning and Organizing Work," (3) "Execution of Duties," and (4) "Communications." He checked "acceptable" for each category.[183]

Since my performance was acceptable in each category, I qualified for a merit step increase.[184] On June 17, 2005, I submitted my self-evaluation—describing my performance—to Hanson, thereby initiating the merit review process.[185] From this point, few facts are known about the process that resulted in my two-step increase. That information is in the exclusive possession of the SEC, specifically Enforcement, and it has tenaciously hung on to it.[186]

One fact is now known. Sometime after June 17, my immediate supervisor, Hanson, prepared his evaluation of my performance. Hanson's evaluation incorporated my self-evaluation and added these comments:

> I supervised Gary Aguirre from January 18, 2005 through the end of the rating period. As shown on his contribution statement, Gary worked extremely hard on one investigation during his time with the group, a significant matter involving the trading by Pequot Capital, one of the nation's largest hedge funds.
>
> Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance, Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has gone the extra mile, and then some.
>
> Gary can work on presenting information in a clearer and more concise manner to enhance the effectiveness of his communications both to those he reports to and those he works with.[187]

The SEC reluctantly produced Hanson's evaluation only after it redacted highly relevant facts.[188] It is undated. It does not show to whom it was sent.[189] Thus, it is unknown when Hanson

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[182] The SEC Form 2494 approving the two step merit rating increase is attached as Exhibit 36.

[183] *Id.*

[184] In November 2004, Cain explained to me that an "acceptable" performance was a precondition to eligibility for a merit step increase.

[185] My email of June 17, including my self-evaluation, is attached as Ex. 37.

[186] The SEC has refused to produce these records in response to my December 30, 2005, FOIA request. Accordingly, I have been forced to file a civil action to obtain these records.

[187] Ex. 38.

prepared or sent his evaluation. It is also unknown whether Hanson sent his evaluation to higher supervisory levels—Kreitman, Berger, or Thomsen—for review or approval. It is known that at least one supervisory level above Hanson saw the evaluation before it was forwarded to the compensation committee.[190] For some reason, the SEC will not disclose the rest of the events.[191] I submitted a request to the SEC pursuant to FOIA and the Privacy Act for the documents that will disclose these facts, but the SEC still refused to provide these records.[192] I have since filed a civil action to obtain them.

Nevertheless, the few known facts about the merit review process are significant. I submitted my self-evaluation to Hanson on June 17. Sometime later, an unidentified supervisor above Hanson forwarded that evaluation to the compensation committee. On August 18, Chairman Cox notified all staff that he had "completed [his] review and approval of the merit step increase proposals."[193] On August 21, Human Resources approved the notification of the merit increase to me.[194] These isolated facts suggest that my two-step pay increase was reviewed and approved through the entire chain of command.

But there is more—an unofficial evaluation of my performance by my immediate supervisors. As discussed above, Assistant Director Kreitman gave out his own unofficial awards. On June 14, 2005, Kreitman gave me the highest of his awards for work on the PCM investigation, the only matter I was handling.[195]

In sum, my immediate supervisors—those most familiar with my work—gave my performance excellent marks: Kreitman on June 14 and Hanson some time after June 17. So what happened after June 17 to cause Branch Chief Hanson, Assistant Director Kreitman, Associate Director Berger and Director Thomsen to change their minds? What did I do to cause these senior Enforcement officials to fire me shortly after the SEC approved my two-step merit increase? This question can be answered in two words: John Mack. That conflict began in late June when Hanson told me that Mack was off limits because of his "powerful political connections."

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[188] *Id.*

[189] *Id.*

[190] On October 10, 2005, I emailed the following question to Staiger:

> The document signed by Robert Hanson that went to the Compensation Committee was undated. Was it part of another document that had a heading, containing a date as well as the identity of the recipient? If so, could I obtain a complete copy of the document, including the heading showing the date and the identity of the recipient(s)?

See my October 10, 2005, email to Staiger; Exhibit 39.

On October 11, 2005, Staiger replied: "There was a supervisory transmittal form from the supervisor to the Compensation Committee along with the Hanson document. It is Commission policy not to release that form." (Ex. 39).

[191] *Id.*

[192] The request was submitted to the SEC on December 30, 2005.

[193] Ex. 40.

[194] Ex. 35.

[195] Ex. 41.

In Giving Mack Favored Treatment, Senior SEC Officials Violated Provisions of the Code of Federal Regulations Prohibiting Favoritism in the Enforcement of the Securities Law.

Among the specific regulations mandating the Commissioners and the SEC staff to be impartial are the following:

1) 17 CFR 200.55: "In administering the law, members of this Commission should vigorously enforce compliance with the law by all persons affected thereby. ...In the exercise of their judicial functions, members shall ...impartially determine the rights of all persons under the law."

2) 17 CFR 200.58: A member should not be swayed by partisan demands....

3) 17 CFR 200.61: "A member should not, by his conduct, permit the impression to prevail that any person can improperly influence him, that any person unduly enjoys his favor or that he is affected in any way by the rank, position, prestige, or affluence of any person."

4) 17 CFR 200.64: "Members should recognize that their obligation to preserve the sanctity of the laws administered by them requires that they pursue and prosecute, vigorously and diligently but at the same time fairly and impartially...all matters which they or others take to the courts for judicial review."

5) 17 CFR 200.67: "On the other hand, the very statutory enactments evidence the need for regulation, and the necessary rules should be adopted or modifications made or rules should be repealed as changing requirements demand without fear or favor."

6) 17 CFR 200.69: "Members should be ...impartial when hearing the arguments of parties or their counsel. ... The Commission should continuously assure that its staff follows the same principles in their relationships with parties and counsel."

7) 17 CFR 200.735-2(a): "In view of the effect which Commission action frequently has on the general public, it is important that members [and] employees ...maintain unusually high standards of ...impartiality..."

8) The above regulations are applicable to both the Commissioners and the Staff (17 CFR 200.735-2(b); 17 CFR 200.50; 17 CFR 200.51).

In granting Mack special and preferential treatment, senior Enforcement staff violated the spirit and letter of these regulations.

The Impact of Blocking the Mack Subpoenas on the GE-Heller Investigation

There is wide agreement that insider trading cases are difficult to prove. Associate Director Thomas Newkirk, who speaks from experience, explained: "Direct evidence of insider trading is rare. There are no smoking guns or physical evidence that can be scientifically linked to a perpetrator. Unless the insider trader confesses his knowledge in some admissible form, evidence is almost entirely circumstantial."[196]

The process of establishing an insider trading case by circumstantial evidence is tedious. Newkirk explains:

> The investigation of the case and the proof presented to the fact-finder is a matter of putting together pieces of a puzzle. It requires examining inherently innocuous events – meetings in restaurants (as in the Dutch case), telephone calls, relationships between people, trading patterns – and drawing reasonable inferences based on their timing and surrounding circumstances to lead to the conclusion that the defendant bought or sold stock with the benefit of inside information wrongfully obtained.[197]

The Court in *Larrabee* also explained how circumstantial evidence may come together to prove insider trading. The Court summarized the factors that supported the jury's verdict:

> We examine [a] myriad factors, including (1) access to information; (2) relationship between the tipper and the tippee; (3) timing of contact between the tipper and the tippee; (4) timing of the trades; (5) pattern of the trades; and (6) attempts to conceal either the trades or the relationship between the tipper and the tippee. The evidence presented at trial, when pieced together, painted a picture which allowed the jury to conclude beyond a reasonable doubt that Larrabee possessed material, nonpublic information about the Bank of Boston-BayBanks merger.[198]

The process of collecting that circumstantial evidence was going well in the GE-Heller investigation by late June 2005. That evidence indicated that Samberg had likely acted on an illegal tip in making his $80 million bet that GE would acquire Heller. The evidence also defined the profile of the likely tipper, which Mack nicely fit. Incidentally, the elements of Mack's profile bear almost a one to one relationship with the factors set out in *Larrabee* above for establishing an insider trading case. But there is one significant difference: *Larrabee* was affirming a jury trial verdict in a criminal case; I was asking my superiors to withdraw their objection to an administrative subpoena.

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[196] Thomas C. Newkirk, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Insider Trading–A U.S. Perspective*, Speech at the 16th International Symposium on Economic Crime Jesus College, Cambridge, England; available at http://www.sec.gov/news/speech/spcharchive/1998/spch221.htm.

[197] *Id.*

[198] *United States v. Larrabee*, 240 F.3d at 21-22.

In terms of time, the investigation was in its infancy. The informal investigation was not underway until late 2004. The Commission had not issued its formal order until January 2005. The first subpoenas were issued in February 2005. The GE-Heller investigation began to take shape in May 2005. Even though the formal investigation was only a few months old, Hanson and Kreitman authorized me on June 14 to present the GE-Heller matter, including Mack and Samberg's possible roles as tipper and tippee, to the FBI and a federal prosecutor the next day. Two weeks later, the FBI opened its complementary investigation. In short, the GE-Heller investigation was rapidly advancing, but it would take time to build the circumstantial evidence necessary to file an insider trading case.[199]

At this point, the case against both Samberg and Mack had been developed exclusively from PCM records and Samberg's testimony. But this was only half the records and testimony. The case against the tipper and tippee is logically developed from evidence derived from both. By late June 2005, it was time to obtain the records and testimony from Mack. Instead of taking this step, senior Enforcement officials blocked the subpoenas for Mack's testimony and records. Once again, insider trading cases are difficult to prove under the best of circumstances. In this case, the investigation involved two of the most sophisticated investment professionals. In barring the investigation of Mack, the SEC blocked the investigation of an insider trading case against Samberg as well.

Another Charade: the SEC Reopens the IG's Investigation and Takes Mack's Testimony

Since July 2005, the SEC has used one charade after another to cover up the fact that senior Enforcement officials gave favored treatment to Mack. After Mack returned as Morgan Stanley's CEO on June 30, 2005, my supervisors were left with the messy problem how to block the Mack subpoena in the face of compelling evidence that it be issued. This was solved by the first charade which could be called "something is missing." It went like this.

Kreitman: You cannot take Mack's testimony unless he had a motive.
Aguirre: Mack had multiple motives and here they are.
Kreitman: Well then, I need greater specificity.
Aguirre: Here are those specific facts *again*.
Kreitman: Well then, you have to show Mack was "brought over the wall."
Aguirre: It doesn't apply.
Hanson: We need another memo why Mack's testimony should be taken.
Aguirre: Fine, here's another one.
Hanson: We'll vet your facts and then decide whether to subpoena Mack.
Aguirre: Sounds good to me.
Kreitman: You're fired.

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[199] Hanson understood this well. After Mack surfaced as the possible tipper, Hanson gave me *The Prosecutors*, by James Stewart, and asked that I read one chapter—*Insider Trading at Morgan Stanley*—which describes the four year process it took to successfully build a case against Morgan Stanley investment bankers for insider trading. This chapter began with the tipper and tippee meeting at The Harvard Club where the tip was passed during a fake chess game used as a cover.

Then, new players joined the ensemble: Chairman Cox and his IG. Faced with allegations that senior Enforcement staff gave Mack favored treatment and then tampered with my personnel records,[200] Chairman Cox called in his IG. The IG promptly asked each of those charged if the allegations were true. All said no. Given that unanimity, there was no point in asking the complainant if he had any evidence to back up his charges. Chairman Cox agreed and the investigation was over. The SEC gave its report to Congress: there was nothing to the allegations.

The SEC has now been forced to do an encore. This one could be called: "We promise to do it right this time." It features the same players from past performances: Chairman Cox, his IG, the IG attorneys, and the senior Enforcement attorneys who blocked the subpoena last summer. The IG attorneys who did the first investigation, which looked like a whitewash, now promised to broaden the investigation to include some evidence. The senior Enforcement attorneys who pretended no grounds existed to take Mack's testimony will now pretend to take Mack's testimony.

Of course, an *authentic* investigation might demonstrate that Mack did not tip Samberg about the pending Heller acquisition. That was one of the reasons I suggested Mack's testimony be taken last August.[201] Unfortunately, the reopening of Mack's investigation seems no more authentic than its closing fourteen months ago. Should Enforcement find some leads in Mack's testimony, those leads will only help prove Enforcement compromised the investigation last summer. Mack could not be safer if his own attorney asked the questions.

Chairman Cox has yet to say the new IG investigation will seek to uncover the truth about the allegations placed before him last September and October. Instead, he reopened the inquiry into those allegations "so the public has every confidence in the thoroughness and fairness of the process."[202] In short, Chairman Cox seeks to prove that the IG investigation was valid rather than find out whether senior Enforcement officials gave Mack a pass on possible insider trading. This again sounds like the first IG investigation whose purpose was to prove senior Enforcement staff were blameless.

One departure from standard SEC practice was the timing of Mack's testimony. The SEC usually takes testimony in an insider trading *before the statute of limitations has expired*. The SEC has employed a different strategy with Mack. It allowed the primary statutes of limitations to expire before Enforcement attorneys asked Mack a single question. Mack's testimony was taken on August 1, 2006. The five-year statute of limitations expired on July 27, 2006 for any criminal charges.[203] Hence, the testimony was taken four days after the limitations period expired.

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[200] See my October 11, 2005, letter to Chairman Cox Ex. 54.

[201] See Ex. 17.

[202] Walt Bogdanich and Gretchen Morgenson, *In Reversal, U.S. Decides to Question Firm's Chief*, N.Y. TIMES, July 22, 2006, at C1.

[203] *U.S. v. O'Hagan*, 139 F.3d 641 (8th Cir. 1998) ("The proper limitations period for the criminal securities fraud counts brought against O'Hagan is the five-year statute of limitations set forth in 18 U.S.C. § 3282").

Criminal proceedings were a serious consideration before senior Enforcement officials blocked Mack's testimony and derailed the investigation of Samberg's trading in GE and Heller. In February 2005, Kreitman told staff working on the PCM investigation that "interesting" the US Attorney "should be a very high priority."[204] To that end, Kreitman authorized me to present the GE-Heller matter, including Mack's and Samberg's possible roles, to that US Attorney's office in June 2005. However, the progress of any criminal investigation of GE-Heller was dependent on the progress of the SEC investigation of GE-Heller.[205] When the SEC derailed its own investigation, it also derailed the criminal investigation. That investigation cannot be revived because the limitations period has expired.

Likewise, the limitations period expired also on July 27 for any case under section 21A of the Securities and Exchange Act of 1934 (Civil Penalties for Insider Trading), the most potent weapon in the SEC arsenal for pursuing those who give or trade on material nonpublic information.[206] That leaves the SEC with only equitable remedies against Mack and Samberg, i.e., injunctive relief. There are gaps in the application of injunctive relief against insider trading, which were eliminated by section 21A, now inapplicable because its limitations period has expired.[207] Equitable relief is also subject to equitable defenses,[208] including delay in filing the case.[209] It was for this reason that the investigation in 2004 only included SRO referrals involving PCM that were approximately three years old or less. In September 2004, Assistant Director Grime gave me this specific guidance on how far back to go: "Typically I would not go back much further than 3-4 years for transactions given the 5 years SOL for penalties."[210]

Kreitman and Hanson did not merely overlook the statute of limitations. In August 2005, I warned both that we faced a problem in completing the investigation of GE-Heller before the statute of limitations expired:

> Assuming we schedule Samberg's testimony a week after Dartley's, which tactically makes the most sense, the five year Statute of Limitations for 10b will begin to expire in eight months and will fully expire in nine...

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[204] See Ex. 6.

[205] The only information the FBI and the US attorney had relating to GE-Heller had been provided to them by the SEC. Further, the arrangement with the US Attorney and the FBI, as I understood it, called for the SEC staff to continue to obtain and mine the records for relevant evidence which would be provided to the FBI and US Attorney.

[206] Civil penalties for insider trading (15 U.S.C. § 78u-1). This statute allows treble damages for insider trading. Its five year statute of limitations also expired on July 27, 2006.

[207] *Excerpt from the S.E.C.'S Insider Trading Plan*, N.Y. TIMES, August 10, 1987, at D8. "While the legislation does not fundamentally alter the scope of prohibited conduct under present law, it eliminates certain anomalies or ambiguities that have arguably been created by some judicial opinions."

[208] *SEC v. Egan*, 856 F. Supp. 398, 401 (ND Ill. 1992) ("If Northern is to be deprived of its money (something that this Court does not now decide), that will take place only after it has had a meaningful opportunity to be heard on the merits and to present any defenses—including equitable defenses—to disgorgement.")

[209] *SEC v. Willis*, 777 F. Supp. 1165, 1173 (SDNY 1991) ("If the remoteness in time is substantial and there have been no intervening violations, it is highly improbable that a court, in the exercise of its discretion, would grant injunctive relief." Quoting from A. Jacobs, 5C Litigation and Practice under Rule 10b-5 § 235.01, at 10-5 (2nd rev. ed. 1991)").

[210] September 17, 2004, email from Grime to me, Ex. 17.

> We have miles to go before we could file a 10b action against Samberg and the investigation on these examinations and other aspects has slowed to a snail's pace.[211]

But even more unusual was the SEC manner of taking Mack's testimony. It issued no subpoena for his records. The examination itself was "brief."[212] Immediately after the examination, "regulators indicated they have no current intention to bring charges against Mr. Mack or Pequot."[213] The SEC previously announced: "If Mr. Mack's testimony doesn't produce additional leads or evidence, the SEC is expected to close the Pequot probe and notify the parties that it doesn't plan to file charges."[214] Those notices were likely in the mail before Mack was sworn in.

Even if the Mack examination was conducted by a gifted and committed prosecutor, it would be a miracle if his testimony produced enough evidence to file a case. Even more so since his testimony was "brief." As discussed above, insider trading cases are proved with circumstantial evidence. On the SEC website, Newkirk explains: "Direct evidence of insider trading is rare. There are no smoking guns or physical evidence that can be scientifically linked to a perpetrator. Unless the insider trader confesses his knowledge in some admissible form, evidence is almost entirely circumstantial."[215]

It takes both time and documents to build a circumstantial case for insider trading. Again, the SEC website offers these comments from Newkirk:

> The investigation of the case and the proof presented to the fact-finder is a matter of putting together pieces of a puzzle. It requires examining inherently innocuous events – meetings in restaurants (as in the Dutch case), telephone calls, relationships between people, trading patterns – and drawing reasonable inferences based on their timing and surrounding circumstances to lead to the conclusion that the defendant bought or sold stock with the benefit of inside information wrongfully obtained.[216]

The SEC never allowed the pieces of the puzzle to be collected for any case against Mack. The investigation lasted one month—June 2005—before senior Enforcement officials blocked any subpoena to Mack. Hence, his records have never been subpoenaed. It is not likely that Mack would confess even if he were the tipper. Unless he came to his testimony brandishing a smoking gun, his investigation for possibly tipping Samberg is over. The SEC has again created a one-of-a-kind investigation of Mack: the appearance of an investigation, but not the reality of one.

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[211] See my August 26, 2005, email to Kreitman, Hanson, Eichner, Ribelin and Jams, Ex. 48.
[212] Ben White, *Mack gave SEC "brief testimony"* FIN. TIMES (London, England) August 3, 2006, at 22. .
[213] *Id.*
[214] Randall Smith, *Morgan Stanley CEO Testifies In SEC Investigation of Pequot*, WALL. ST. J., August 3, 2006, at C4.
[215] Newkirk *supra* note 196.
[216] *Id.*

It may be helpful to contrast the SEC's investigation of Mack for possibly giving Samberg a tip used to trade *$80 million of stock* with its investigation of Martha Stewart for allegedly receiving a tip used to sell *$225,000 of stock*. Had the SEC made the same decision for her as it has for Mack, it would have dropped her investigation in April 2002, when her statement was taken. Instead, the SEC continued that investigation for another fourteen months. No case for insider trading was ever proved against Stewart. Instead, she was convicted of lying to a federal officer based on her April 2002 statement. In sum, though the charade is a new one, the bottom line is the same: special treatment for John Mack.

Conclusion

There were two tracks of events on a collision course in late June of 2005. On one track, the PCM investigation was gathering momentum. The evidence was growing stronger that Samberg had traded on an illegal tip when he bet $80 million in July 2001 that GE would acquire Heller. The only evidence supporting Samberg's decision had been dug up four years later by Samberg's attorney. Samberg never saw this information before his attorneys showed it to him. The evidence had also begun to point to Mack as the likely tipper.[217] The next logical step in piecing together the circumstantial evidence to establish a case for insider trading was to subpoena Mack and his records.

But a more powerful locomotive was running on another set of tracks. Mack and Morgan Stanley had decided Mack would return as Morgan Stanley's CEO. That was impossible if the SEC was investigating Mack for insider trading. The PCM investigation had to go away. It did. The dirty work was done by my supervisors, but the evidence demonstrates that a higher office made the call. The fingerprints of Director Thomsen and Associate Director Berger were found all over that decision. The only real issue is whether Thomsen was taking instructions from someone else.

Since then, the SEC has done all possible to cover up its illegal decision granting favored status to Mack. It gave phony reasons why his testimony could not be taken. It fired me when it realized I was challenging the propriety of Mack's favored treatment at higher and higher levels of the SEC. It tampered with my personnel records more than three weeks after my firing. It then whitewashed the whole affair. It now wants to cleanse itself with another "investigation" and Mack's testimony.

The favor the SEC gave to Mack could not have been more expensive for the capital markets. The PCM investigation had focused on whether the incoming CEO of the world's third largest investment bank gave an $18 million illegal tip. An illegal $18 million tip was obviously received by the CEO of the world's largest hedge fund. If it happened, the heads of two major financial institutions had committed securities fraud. If so, neither CEO could be expected to set higher standards for others than they set for themselves. The SEC favor to Mack was also a favor to Samberg. No case could be proved against him without proof of the tipper's identity.

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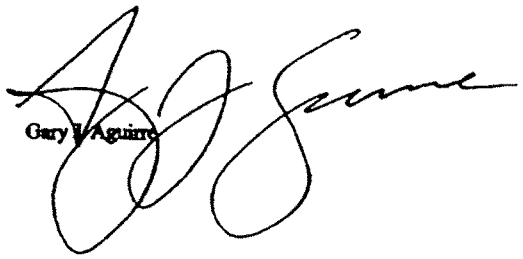
[217] See my email of July 19, 2005, to Hanson attaching the Enforcement Monthly Report for June 2005 on the PCM investigation, Ex. 29.

Under all these circumstances, the SEC has not earned the indulgence of your Honorable Committee for yet another "investigation" of its favor to John Mack.

Very truly yours,



Gary J. Aguirre

Enclosure: Exhibit List; Exhibits 1 through 54

CC: The Honorable Senator Richard C. Shelby, Chairman, Committee on Banking, Housing and Urban Affairs.
The Honorable Senator Paul S. Sarbanes, Ranking Member, Committee on Banking, Housing and Urban Affairs.
All Members of the Committee on Banking, Housing and Urban Affairs.

Exhibit List

1. May 9, 2005, email from Gary Aguirre to Lesley Florschutz, SEC staff member, Mark Kreitman, Assistant Director, and Robert Hanson, Branch Chief.
2. June 27, 2005, email from Gary Aguirre to Mark Kreitman, Robert Hanson, and Eric Ribelin, Branch Chief.
3. June 28, 2005, email from Gary Aguirre to Mark Kreitman, Robert Hanson, and Eric Ribelin.
4. Index to the evidence book for FBI and U.S. Attorney.
5. June 20, 2005, string of emails between Gary Aguirre and Robert Hanson.
6. February 22, 2006, email from Mark Kreitman to Gary Aguirre, Hilton Foster, SEC staff member, Robert Hanson and Eric Ribelin.
7. February 28, 2001, email from Arthur Samberg to David Zilkha.
8. April 30, 2001, email from Arthur Samberg to David Zilkha.
9. June 15, 2001, email from David Zilkha to Arthur Samberg.
10. June 18, 2001, email from David Zilkha to Arthur Samberg and Jerry Schendel.
11. April 6, 2001, email from Arthur Samberg to David Zilkha.
12. Timeline of events.
13. April 20, 2001, email from Arthur Samberg to David Zilkha.
14. April 23, 2001, email from Arthur Samberg to Mark Broach and Jerry Schendel.
15. (a) March 14, 2003, email from Shash Patel on instant messaging.
16. May 23, 2001 email from Arthur Samberg to David Zilkha.
17. August 24, 2005, email from Gary Aguirre to Paul Berger, Associate Director, and August 4, 2005, email from Gary Aguirre to Robert Hanson.
18. August 4, 2005, email from Gary Aguirre to Robert Hanson.
19. July 27, 2005, email with attachments from Gary Aguirre to Mark Kreitman, and Paul Berger.
20. June 30, 2001, email from Arthur Samberg to Jerry Poch.
21. August 17, 2005, email from Gary Aguirre to Mark Kreitman, and Robert Hanson.
22. August 4, 2005, email from Gary Aguirre to Robert Hanson.
23. August 24, 2005, email from Gary Aguirre to Robert Hanson.
24. August 4, 2005, email from Robert Hanson to Gary Aguirre.
25. PCM document responding to SEC inquiry, question 7.
26. June 6, 2005, email from Gary Aguirre to Robert Hanson and others.
27. June 20, 2005, email from Robert Hanson to Gary Aguirre.

28. June 29, 2005, email from Gary Aguirre to Mark Kreitman.
29. July 19, 2005, to Robert Hanson attaching the Enforcement Monthly Report for June 2005 on the Pequot Capital Management investigation.
30. June 3, 2005, email from Gary Aguirre to Eric Ribelin, Hilton Foster, Jim Eichner, SEC staff member, Thomas Conroy, SEC staff member, Stephen Glascoe, SEC staff member, Nancy Miller, intern, Robert Hanson and Mark Kreitman.
31. August 4, 2005, email from Gary Aguirre to Linda Thomsen, Director of Enforcement.
32. August 10, 2005, email from Gary Aguirre to Linda Thomsen.
33. August 17, 2005, email from Gary Aguirre to Robert Hanson and Mark Kreitman.
34. September 2, 2005, fax from Gary Aguirre to Christopher Cox, SEC Chairman.
35. Gary Aguirre's merit pay increase.
36. SEC for 2494 for Gary Aguirre.
37. June 17, 2005 email from Gary Aguirre to Robert Hanson, with attachment: Gary Aguirre's statement of contributions.
38. Robert Hanson's undated evaluation of Gary Aguirre's work.
39. October 10, 2005, email from Gary Aguirre to Charles Staiger, SEC staff member, and October 11, 2005, email fromn Charles Staiger to Gary Aguirre.
40. August 18, 2005, email from Christopher Cox, SEC Chairman.
41. Perry Mason Award.
42. June 3, 2005, email from Robert Hanson to Gary Aguirre.
43. February 18, 2005, email from Gary Aguirre to Robert Hanson and Mark Kreitman.
44. August 5, 2005, email from Robert Hanson to Gary Aguirre.
45. September 26, 2001 email from Arthur Samberg to J. DiMenna.
46. September 17, 2004, email from Richard Grime, Assistant Director, to Gary Aguirre.
47. July 19, 2005 email from Gary Aguirre to Mark Kreitman, Robert Hanson, Eric Ribelin, Jim Eichner, and Liban Jama.
48. August 26, 2005, email from Gary Aguirre to Mark Kreitman, Robert Hanson, Jim Eichner, Eric Ribelin and Liban Jama.
49. October 8, 2004, email from Gary Aguirre to Charles Cain, Branch Chief, and Richard Grime.
50. February 3, 2005, email from Eric Ribelin to Gary Aguirre.
51. PCM response to SEC inquiry, question 5.
52. June 3, 2005, email from Robert Hanson to Gary Aguirre.
53. July 27, 2005, email from Gary Aguirre to Paul Berger.
54. October 11, 2005, letter from Gary Aguirre to Chairman Christopher Cox.

From: Aguirre, Gary J.
Sent: Monday, May 09, 2005 4:54 PM
To: Florschutz, Lesley
Cc: Kreitman, Mark J.; Hanson, Robert
Subject: Request for Contract Paralegal

Hi Leslie:

By this e-mail, I request that a contract paralegal be appointed to this matter. I summarize below the multiple factors which I believe justify such action. In this matter, Staff is investigating 18 possible insider trading matters--all referred by SROs after they conducted their own investigations. The trading under investigation was done by one of the largest hedge funds in the US. The case is evolving into one of the largest insider trading investigations in recent years.

The volume of electronic and hard copy documents being produced in this matter ranks as one of the largest in recent Commission history. I have currently subpoenaed electronic and hard copy production from 21 parties to the investigation. Cumulatively, they have produced approximately one million hard copy and electronic pages. At this point, I expect over four million documents to be produced in this matter. Those documents must be reviewed and organized to be a factor in this investigation.

In its letter of April 29 (attached), the law firm representing the hedge fund, just one party to the investigation, states that it is now producing 80,000 electronic records and 300,000 pages per week. The letter goes on to state that it has 5 partners, 15 associates, 4 paralegals and 35 contract attorneys working on this matter, a total of 59 attorneys and paralegals from one law firm. According to the letter, the contract attorneys are working 6 days a week, 10 hours a day reviewing documents.

In addition to the law firm representing the hedge fund, there are 6 other major law firms representing the hedge fund's employees. All of these law firms have produced or are in the process of producing voluminous additional electronic and hard copy documents. Each of the law firms has several attorneys and, we believe, additional paralegals working on this matter.

In addition to the hedge fund and its employees, there are 17 other parties producing documents. These parties include some of the largest corporations, e.g. General Electric, in the US and are naturally represented by some of the largest law firms. Last week alone, I received 12 boxes of documents and 24 CDs of electronic documents, over 100,000 documents. I was unable to review these documents since I was in New York taking testimony. Further, almost all are "rolling productions" pursuant to currently outstanding subpoenas and thus the document production will continue during the next 3 months. Over the next 10 days, I will be issuing additional subpoenas to new parties calling for the production of documents. Hence, the document production per week will likely increase.

From: Aguirre, Gary J.
Sent: Monday, June 27, 2005 7:42 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Ribelin, Eric
Subject: Samberg's trading in HF and GE:

This memo summarizes the evidence, *especially Samberg's own testimony*, suggesting that he acted on confidential information in making his trading decisions on GE and HF. This memo supplements but does not repeat the information contained in the Excel spreadsheet that chronicles the events leading up to the public announcement of the GE-HF acquisition.

A) Samberg's wanted to buy more HF and short more GE

On July 30, 2001, General Electric announced its acquisition of Heller Financial ("HF") at approximately a 50 per cent premium to its last trading price. From July 2 through July 27, 2001, Samberg purchased 1,148,200 shares of Heller for a purchase price of $43,839,784.43. His profit on HF, according to PCM records, was $16,939, 578.52.

Samberg wanted to buy significantly larger blocks of HF during July 2001, particularly during the week before the public announcement. On July 2, the first day he directed in PCM, he directed the purchase 223,700 shares; only 100,000 shares were filled. The total trading volume on that day was 388,900 shares. On July 10, 2001, Samberg directed his PCM trader to purchase 455,300 shares; only 100,000 shares were filled; trading volume was 375,600 shares. On July 11, Samberg's order was for 336,500 shares; only 56,500 shares were filled; volume that day was 158,200 shares. During the week of July 23, 2001, the week before the public announcement, Samberg directed his traders to purchase 480,400 on Monday, 418,500 on Tuesday, 373,000 shares on Wednesday, 302,900 shares on Thursday, and 243,900 on Friday. His trader purchased only 10,000 on Monday, 18,500 on Tuesday, 10,000 on Wednesday, 20,000 on Thursday, and 10,000 shares on Friday. On July 30, 2001, the day of the announcement, Samberg had a standing order to purchase 233,500 shares. Later that day, after the announcement, he sold his entire holdings of 1,148,200 shares.

Likewise, Samberg engaged in heavy short sales of GE beginning on July 25, five days before the public announcement of the acquisition. On July 25, he directed his trader to short sell 766,600 shares of GE. It was fully executed. On July 26, he directed his trader to short sell an addition 385, 200 shares of GE; only 50,000 were executed. On July 27, Samberg instructed his trader to short sell an additional 385,500 shares of GE; only 20,000 were executed.

The point is this: Samberg risked $80,000,000 of PCM assets belonging to sophisticated institutional investors. He wanted to risk much more. This suggests that he had extraordinary confidence in PCM's research in GE and HF or that for some other reason he believed HF's price would go up and GE's would fall. This memo next takes a look at PCM's research on both sides Samberg's GE-HF bet.

B) Samberg's explanation why he bought Heller Financial (HF) is not credible.

1) Samberg regurgitated information during his testimony why he purchased HF that was spoon fed him by his attorneys.
   a) Samberg identifies six reasons he purchased HF's stock: (1) credit climate that existed in 2001 was favorable for HF; (2) HF's strong financial model; (3) speculation that HF would be involved in a consolidation; (4) analysts' reports described the attractiveness of the HF franchise; (5) the relative performance of HF vs. other financial stocks; and (6) analysts' reports that HF was growing at ten percent and was projected to continue that growth (RT II, p. 67, l. 2 – p. 69, l. 22).
   b) Each data point was described in the materials shown to Samberg by his counsel shortly before he testified (RT II, p. 75, ll. 25 – p. 80, l. 19).[1]
   c) Five of the six items above were contained in Legg Mason report that Samberg did not see *until months after he purchased HF.*
   d) Samberg claims he saw an analysts report in July 2001 like the one his attorneys showed him. PCM has produced no such report. No is there a hint of one in the PCM production. Here's Samberg's testimony on the report shown to him by his attorneys:

      Q Have you seen this report in any e-mail dated before July 30, 2001?
      A I don't recall seeing it.
      Q Do you have a high regard for sell side analysts?
      A I have a high regard for them as people. I don't have a high regard for using their reports to make investment decisions.
      Q It would have been very unusual for you to rely on a sell side report, would it not, in making an investment decision?
      A Historically, that is true.
      Q In fact, isn't it true, sir, that you don't think they're worth a damn?
      A In general, I don't think their reports are worth a damn. The people can be, but not the reports.
      Q Right. And you've made that statement publicly, have you not?
      A I have.
      Q So this is – Exhibit 19A is sell side research, is it not, sir?
      A Sure is.
      Q Exactly what you said isn't worth a damn. Correct?
      A You bet.
      Q So is it fair to say that the research you saw in July 2001 about Heller Financial also wasn't worth a damn?
      A I really don't know what I saw.

2) Samberg consulted with no one, contrary to PCM practices, before and during his trading in HF.
   a) Samberg did not communicate with anyone at PCM before buying HF. (RT I, p. 70-71).
   b) No one assisted Samberg in making the HF trading decisions in July 2001.Samberg made a decision not to seek the help of any of the 250

[1] When it was established that Samberg was spoon-fed information by his attorneys as reasons he purchased HF, he attempted to create fussy new reasons for his trading decisions (RT II, p. 81, ll. 2-25).

people who worked at PCM in connection with his decision to buy HF (RT I p.112, ll. 16-23).

c) Samberg can recall no discussions with anyone at PCM regarding his decision to purchase HF (RT I, p. 71, p. 81, l. 9-15).

d) Samberg has no recollection of speaking with anyone employed with HF before making the decision to purchase HF (RT I, p. 71).

e) Samberg can recall no discussions with any financial services firms or brokerage firms or consultants before making his decision to invest in HF (RT I, p. 81, l. 22 – p. 83, l. 4).

f) Samberg does not recall speaking to any analyst about HF when he was purchasing the stock (RT II, p. 55, l. 23 p. 56, l. 6).

g) Samberg does not recall speaking with anyone about HF before or during the period the period he purchased it (RT II, p. 56, l. 14-17).

h) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. [See PCM "due diligence" section below.]

3) No PCM documents were generated when Samberg purchased HF except trade blotter.

a) Samberg maintained no hard copy or electronic files relating to his decision to buy HF (RT I p. 69 ll. 11-14).

b) No one prepared any files regarding Samberg's decision to trade in HF (RT I, p. 79, l. 24 – p. 80, l. 4).

c) Samberg could not identify any analyst report that he claims to have read before his decision to buy HF in July 2001 (RT I p. 70, ll.18-22) [Hard to understand why Samberg would consider any analyst report because, according to him, "analysts' reports aren't worth a dam."

d) Samberg also testified at the second session that he does not recall seeing any analyst report before or during the time he was purchasing HF's stock (RT II, p. 56, l. 7-13).

e) PCM produced only two documents relating to Samberg's decision to purchase HF stock. One is an e-mail dated July 11, 2001, from Samberg to his chief trader which states "where are we on HF?" The second is also an e-mail sent from Samberg after the July 30 announcement of the acquisition. It contains only the following symbols: :) :) :) :) :) :) Samberg can recall no other e-mails (RT I p. 108 ll. 23-25).

f) Samberg has no recollection of seeing any newspaper articles about HF before buying the stock (RT I, p. 72).

g) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. [Also, see PCM "due diligence" section below.]

4) Samberg did no home work on HF before purchasing $44 million of its stock.

a) Samberg did not closely follow HF "in the way people follow stocks before it was purchased" (RT I, p. 72).

b) Samberg had "no recollection specifically of how I started the Heller investment other than to know that I had been doing this for many years and recognized these opportunities when they come up" (RT I, p. 74).
c) Samberg's decision to purchase HF in July 2001 had "nothing to do with Heller (RT I, p. 74-75)." Rather, "it was everything to do with the charge I had, which was to manage an important piece of money for clients" (RT I, p. 75).
d) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. Also, see PCM "due diligence" section below.

5) HF was not in an industry that Pequot covered in 2001.
a) PCM and its Core Group, which Samberg managed, focused on technology, media, telecom and healthcare in July 2001(RT I, p. 59-60).
b) HF was in the "financial services industry" (RT I, p. 75-76).
c) Samberg could not recall purchasing securities in this industry before July 2001 (RT I, p. 76, ll. 12-18).
d) PCM had no one who specialized in financial stocks when Samberg bought HF (RT I, p. 75-76).

C) Samberg could offer no explanation why he began a $36 million short of GE stock five days before the public announcement GE was buying HF.

Here's the transcript:

Q Now, two months later, almost two months later, there is a short by you, sir, on July 25, 2001 in the amount of 756,000 shares or just shy of $33 million.

Do you see that, sir? [I was showing Samberg GE trade blotter]
A I do.

Q Now, can you tell us the reasons that you felt that GE should be shorted at that particular time?

A No, I can't.

Q Do you recall whether you were relying on technical analysis or fundamental analysis?

A I can't remember anything about the trade.

Q Now, I notice that that was the largest trade made in GE except for the sale -- or, excuse me, the -- well, that was the largest trade in GE up until that point in time.

A There was a larger one in August.

Q Right. That's when it was covered, sir. I said up until that point in time.

A Okay.

Q You have no understanding at this point why you made that trade?

A No.

Q Do you know why you made it just –

A Do you know how many trades I made that year?

Q Do you know why you made it five days before the public announcement on Heller Financial?

A No idea.

Q The next day, I notice the -- excuse me, two days later, on July 27th, you shorted another 34,000 shares of GE. Correct, sir?

A That appears to be the case.

Q Do you know why you shorted it on that date?

A No.

Q Do you have any recollection whatsoever?

A None.

Q Have you attempted to ascertain from any records what caused you to trade --

A Well, first I have to realize that I did do it. So no, I made no ascertations.

Q Now, do you have any explanation why you had $80 million invested in GE and Heller Financial a few days before a public announcement of the --

17 A $80 million in what?

18 Q You had 44 million in Heller Financial. You had
19 36 million in GE.

20 A You're linking the two. I'm not willing to do
21 that. That's -- I don't understand that at all.

22 Q Thank you. So they weren't linked in your mind?

23 A They were or were not?

24 Q They were not linked in your mind at that time?

25 A No.

[Samberg's above testimony that his GE and HF trades were not related is inconsistent with his testimony (see below) that he bought because there was speculation of a merger. Since he is lying, it's hard for him to keep his story straight.]

D) Samberg's $80 million trades in HF and GE cannot be reconciled with his description of PCM's due diligence procedures in 2001 for making such trading decisions.

Samberg's testimony below follows his identification of a pamphlet delivered to PCM investors describing PCM's "due diligence" procedures in making trading and investment decisions. Samberg's decision to buy HF without consulting with any of PCM's 250 employees, without speaking at HF, without following HF, and without researching HF cannot be reconciled with PCM's customary "due diligence" before making such decisions. Two points: he didn't need to do a "due diligence" because he had the info; he violated PCM's practices or he's lying about how he made the decision.

9 Q And in the first sentence, it says, "This due

10 diligence package was created by Pequot Capital Management,

11 Inc. for current and prospective investors and their

12 immediate affiliates."

13 Is that correct, sir?

14 A Yes.

15 Q Now I'd like to ask you to turn over to page 8,

PCM-081626. And under Roman numeral V, "Investment Style and Strategy," I'd like you to focus on item 1. And I'm going to read it, the first sentence, and I'm going to ask you if it's a true statement.

"Describe the development of your investment approach and how investment ideas are generated." So this is -- the statement follows. "Pequot Capital's investment process begins with an intensive research of a company's underlying fundamentals."

Is that a correct statement, sir?

A Yes.

Q Was that correct in 2001?

A Yes.

Q "Investment ideas are generated as a result of meetings directly with company senior management teams."

Is that a correct statement?

A Uh-huh. Yes.

Q Is that correct in 2001?

A Yes.

Q "This allows the investment team to understand a company's management structure, thought process, strategic direction, and products."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes, it was.

Q "In-depth meetings and industry research provides the research to prospective fund's analysts with an overview of a particular industry as well as the individual company, and allows for comparisons to be made within that specific industry."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes.

Q "The investment staff visits thousands of companies each year, conducts extensive interviews with management as well as competitors, suppliers, distributors, and customers."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes.

Q "Based on research, the investment analyst is able to formulate business models and discuss their ideas with other members of the investment staff and the respective fund's portfolio manager prior to a position being included

12 within the portfolio."

13 Is that a correct statement, sir?

14 A Yes, it is.

15 Q Was it a correct statement in 2001?

16 A Yes, it was.

17 Q "The portfolio manager makes the ultimate decision

18 as to whether or not a position will be added to the

19 portfolio."

20 Is that a correct statement?

21 A Yes.

22 Q Was it a correct statement in 2001?

23 A Yes, it was.

24 Q "The investment approach is consistent across all

25 funds managed by Pequot Capital."

1 Is that a correct statement?

2 A Yes, it is.

1 Is that a correct statement?

2 A Yes, it is.

3 Q Was it a correct statement in 2001?

4 A Yes, it is.

E) What does Zilkha-MSFT tell us about Samberg? .

As you know, however, there is a missing link in GE/HF: If Samberg traded on material nonpublic information (MNI), where did it come from? There are no e-mails to or from Samberg referring to any contacts with GE, HF, or any of the investment bankers

involved in the acquisition. The Samberg-Zilkha e-mails show how Samberg operates. They again and again show Samberg using Zilkha to get MNI from Microsoft. One shows Samberg asking Zilkha "those [MSFT] contacts have any views on the direct tv – Murdoch –rumored msft possible deal?" This does not prove the GE-HF case, but does it suggest why Samberg's explanation makes no sense on HF and why he has none on GE? Beyond a reasonable doubt on GE-HF? Not yet. Meet the preponderance of the evidence burden? I'll get back to you after Samberg testifies on Zilkha. I have also asked Nancy to do an Excel spreadsheet on the Samberg-Zilkha-MSFT trades.

F) Was John Mack the tipster?

You have the Excel spreadsheet. I will get the revised, edited version to you by tomorrow. In summary, Mack likely had the GE-HF info sources, he had contacts with Samberg during the period, there was *quid pro quo*, mutual trust existed, and Samberg needed a huge favor. Samberg's need for a big favor is a new idea. His company was splitting a part. Benton was a younger and brighter light. Benton's performance was demonstrably superior to Samberg's. Samberg[redacted]. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, [redacted] and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and ***I did things in a manner that was expedient at the time given my expertise in this area.***

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. ***Times were fragile.*** I needed their approval to do whatever I wanted to do ***or they might walk.*** So I wanted them to meet anybody that I was interested in talking to to building out the platform.

From: Aguirre, Gary J.
Sent: Tuesday, June 28, 2005 5:46 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Ribelin, Eric
Subject: GE-Heller: Obstacles and proposed next steps

This memo summarizes the proposed steps for advancing the investigation of the GE-HF investigation. I have other thoughts regarding how we might advance the investigation of other SRO referrals (e.g., Elite Information and Blue Coat Systems) as well as the efficient identification of other insider trading activity.

I assume you have reviewed memo 1 which summarizes Samberg's testimony on why he traded in HF and GE. His explanation of his HF trading lacks credibility and he has none on GE. Still, we need to establish the likely path through which the material nonpublic information (MNI) flowed to Samberg. Proposed below are five avenues for establishing that path.

A. Documents-Testimony from the five investment bankers (CSFB, Morgan Stanley, JP Morgan, Lehman and Merrill Lynch) or the two principals (GE and HF).

I discuss these possible tip sources in ascending order, given what we know now, of probability. .

The least likely sources *at this point* are Heller, Merrill Lynch, and Lehman. We have no evidence of any Samberg-HF contacts. Samberg denied having any contacts with HF. He could not identify any of the HF employees involved in the acquisition. Merrill was consulted by Fuji Bank very early, was not hired, and was not heard from again. Yesterday, Merrill produced documents pursuant to our subpoena on a CD which I will review when they have been posted to Iconnect. Hence, its status could change if something shows up. Samberg did testify that he might have spoken with someone from Merrill. Also, there were a huge amount of hard and soft dollar commissions that went to Merrill from July 1, 2001, through June 30, 2002 (approximately $16 million). The chronologies indicate that Lehman, which had investment banking ties with Heller, did not become involved until just before the announcement of the acquisition in late July 2001. I have not as yet served a subpoena on Lehman.

JP Morgan is up on notch as a source of a tip. It consulted with Fuji from beginning to end. However, Samberg testified he knew no one on the JP Morgan acquisition team. JP Morgan's counsel wrote that there were no e-mails between Morgan's and Pequot. Additionally, Samberg testified that he does not recall anyone having any contacts with anyone from JP Morgan in 2001. In short, we have no leads.

Up another notch as a tip source is GE. Samberg knows two members of the GE acquisition team, John Myers and Kenneth Langone. Langone was an outside director and there are few e-mails between him and Samberg in 2001. One e-mail suggests that Langone and Samberg met in January 2001. Samberg testified he was not certain he

knew Langone in 2001. However, his testimony regarding Langone was a little suspicious (RT II p. 28, l. 20-p. 31 l. 14). Samberg has a much stronger relationship with John Myers, CEO of GE Asset Management. It dates back to the late nineties. He attends basketball games with Myers. When I asked Samberg if he ever discussed GE business with Myers in these games he responded, "What do you mean by discuss 'GE businesses?'" However, GE's chronology indicates that both Myers and Langone did not learn about the HF acquisition until just before it was announced. However, there is no accuracy warranty with the chronos; Chrysakos—the GE VP that went to prison as a tipster on GE-HF—was not even mentioned in the GE chronology to the NYSE. I have asked GE, represented by Wilmer-Cutler, to submit a more complete chrono in view of the Chrysakos omission.

The second highest probability of the tip would be Morgan Stanley (MS), which consulted with GE, for two reasons. First, MS is Pequot's prime broker. Samberg rattled off about ten names of higher echelon MS people he knew in 2001, though he denied knowing any of the individuals on the acquisition team that consulted with GE. More importantly, there is the Mack connection. The rub is that Mack left MS in March or April 2001, before MS knew about GE-HF. However, Mack came from the institutional side of MS and had been expected by the media to bring many of its bankers with him to CSFB, implying the depth of his relationships with MS bankers that might have known about GE-HF. It later became public that there was a contractual prohibition in Mack's severance agreement precluding him from hiring away MS staff. Yesterday, we received packet of Samberg-MS e-mails from MS for the period before Mack left MS. The more interesting e-mails would be those after he left and after MS learned about GE, which have not as yet arrived. I doubt we will find anything like a tip, but we find him being chummy with somebody who knew about GE-HF.

The top spot goes to CSFB, which consulted with HF, for reasons you know. This could of course change if it turned out that Mack had no significant contacts at CSFB until after July 2. As you know, we have subpoenaed communications between Mack and Pequot from June 1, 2001, until June 2004, when he left CSFB. My view is that we should broaden the subpoena to obtain (1) all communications between Mack (we now have his e-mail address just before he started with CSFB) and CSFB for the two months before he began with CSFB and (2) all documents relating to his phase in as CEO at CSFB generated during June and July 2001. Further, I think we need to take Mack's testimony and simply nail down whether he will admit that he knew about the GE/HF acquisition from any source. Obviously, he could have learned this at either CSFB or MS. Since the GE-HF info could have been communicated to him in the regular course of business from CSFB, and thus third parties would be innocently involved, he might actually tell us if this occurred. If this was the tip path, the question would be when: the closer to June 29 or the morning of July 2, the stronger the case that he was the tipster. As discussed in my first memo, please keep in mind that Samberg was a heavy purchaser of HF on July 2 and tried to buy more than twice the amount he actually executed. I have asked Tom Conroy to get BOA Montgomery's trading tickets for July 2 so we can determine whether the trade was put in at the opening or during the day. If it was put in

during the day, the tip could have come on the morning of July 2. If by any chance that is when Mack learned of the acquisition, he would look very much like the tipster.

It is also important whether Mack had his GE/HF information refreshed during July 2001. On July 9, Samberg, for some reason, only tried to buy 15,000 shares of HF. The next day, he directed his trader to purchase 455,300 shares of HF. What did he learn between his July 9 order and his July 10 order? Did Mack have his information refreshed at this time?

In short, the broadened subpoena and Mack's testimony could (1) point to Mack as the tipster or (2) eliminate Mack as the tipster and thus suggest we eliminate CSFB and look closer at the other candidates.

B. Production of additional e-mails.

A second possible source of evidence indicating the tipster for GE/HF is the yet un-produced e-mails of Pequot. There are two possibilities. First, Pequot is holding aa now unknown number of e-mails and instant messages for privilege review. Fried Frank has represented that there are no e-mails to or from Samberg for the period of April 15, 2001, through July 31, 2001, among the withheld e-mails and IMs. I do note that there are several e-mails to and from Pequot's General Counsel at the critical time relating to "investment decisions."

A second possible source, and probably the only realistic one for GE/HF, is the backup tapes. There are four classes: the Andor tapes, the missing tapes, the damaged tapes, and the non-exchange server tapes. Irvine Pollock and Larry Storch have been hired for the task of ascertaining what happened to the missing tapes, locating any other non-exchange server tapes with e-mails, and retrieving any e-mails from the damaged tapes. I see Pollack-Storch as PCM's protective wall of integrity around the tapes. Shame on anyone who suggests Pollack-Storch is not getting to the bottom of backup tape brouhaha. As you know, I have written Audrey Strauss regarding the newly discovered non-exchange server tapes and got a reply form Larry Storch, which did not respond to my questions, e.g., which Pequot employee had possession of the recently discovered non-exchange server tape from which e-mails were retrieved. I think Audrey has the best of all worlds right now regarding these three categories of tapes: the Pollock-Storch wall of integrity and my inability to press them for answers to pertinent questions. Mark's call last week to Fried Frank may get Pollack-Storch to concede they simply represent Pequot.

The circumstances involving the backup tapes may be an obstruction of justice case. How and when did dome of the tapes get damaged? How did some get lost? If I have to take this on without some guidance, it is a very big job.

That leaves us with the Andor tapes. I understand that Audrey will send me a response next week to my request from legal authorities supporting Pequot's assertion of privilege.

C. ***Peter Dartley.***

So far, outside of Samberg, Pequot e-mails/documents indicate only one other Pequot employee knew anything about the GE/HF trades, Peter Dartley. On July 11, 2001, Samberg wrote Dartley, "Where are we on HF?" Dartley was Samberg's chief trader in July 2001. Samberg dealt directly with him and often gave him directions to make trades. The quote above suggests that this was done on HF. Dartley posted the HF trades and the GE trades to the handwritten Pequot trade blotter.

Dartley was also an intermediary when Samberg needed information about engaging in an arbitrage transaction on GE-HF after the announcement of the acquisition but before the close. Other e-mails suggest that Dartley was Samberg's confidante on investment decisions and other matters.

Pequot's employment list indicates that Dartley started work with Pequot in 1994 and never left. This is not accurate. The Chief Trader at MS told me that Dartley left (I think retired from) Pequot and later rejoined Pequot some time in 2003 in his current position as a "Managing Director." His new assignment was to restructure Pequot, an assignment that says volumes about Samberg's trust in Dartley. If any incriminating e-mails exist, I suspect they would be between Samberg and Dartley.

I think we should issue a subpoena for all e-mails to and from Dartley from January 1, 2001, to the present, as we have with 34 other Pequot employees. He should also go to the top of the testimony list.

D. The emerging mosaic of Samberg's activities during June and July 2001

As you know, Nancy has been working on an Excel spreadsheet that includes key e-mails to and from Samberg, including those to/from or mentioning Mack. It also contains trading info and info from the GE-HF chronologies. Relevant data from phone records and credit cards will be entered as it arrives. This mosaic, especially with input from CSFB or MS regarding Mack, could become a clearer and clearer picture of the path of the tip.

E. Calls to former Pequot employees

2001 was a turbulent year at Pequot. Many people left with Dan Benton to form Andor. Others simply left. Some appear to have been fired. Eric and I have frequently discussed questioning former Pequot employees. Of course, the closer they were to Samberg in June or July 2001, the better. One obvious candidate is Wendy Chicosky Samberg's secretary in June and July of 2001. She left in mid-October 2001, which means she could have gone to Andor. Among other things, she kept his daily calendar. There is a dilemma here: if we call former Pequot employees, they may not talk because of the confidentiality agreements they signed; if we take their testimony, they may get "lawyered up" by Fried Frank selections before they testify.

As with other insider trading cases, it is necessary to establish contact between the suspected tippers and tippees. Finding telephone contacts at critical dates and times is one of the traditional ways of establishing the link. In this case, we are dealing with 21 institutions and thus the task of reviewing phone records is an enormous one.

In addition to the above factors, the organization of documents in this matter is critical because I am working with staff members outside of my branch and outside the Division of Enforcement, which include OEA, OC, IM, IT and Market Surveillance. Other staff members must have access to these documents and hence they must be organized in a way that they are accessible to others.

I am the only full time staff member assigned by my AD to this matter. I have requested the assistance of our assigned paralegal, but she is backlogged with other matters. A senior staff member from a different section of Enforcement has provided some assistance with document review, but he will not be available in two months. As of today, I understand another attorney will be working with me on this matter.

My other responsibilities in the case prevent me from dedicating my full time to the review of documents. Among these responsibilities are the following:

- initiating and responding to all correspondence, including investigative correspondence, with the 24 law firms involved in this matter;
- preparing for and taking the numerous testimonies of the employees of the parties to this investigation;
- working with our IT staff to correct the frequent deficiencies in the electronic data submitted by the parties to this investigation;
- preparing status reports to my superiors at the Commission;
- communicating with and coordinating the investigation with staff members from other offices and divisions of the Commission, including Market Surveillance, OEA, IM, OC and IT.

Time period: I would expect the time period to be approximately 4 months. We would of course prefer that someone begin as soon as possible. We expect that the voluminous hard copy and electronic document production will continue over the next 3 months, and it would likely take an additional month to organize and review those documents after the last delivery.

Thank you for considering this request.

Gary J. Aguirre
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Securities and Exchange Commission
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Gary Aguirre

From: Hanson, Robert
Sent: Monday, June 20, 2005 8:25 PM
To: Aguirre, Gary J.
Subject: Re: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Okay Gary you've given me the bug. I'm starting to think about the case during my non work hours.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Hanson, Robert <HansonR@SEC.GOV>
S nt: Mon Jun 20 13:45:43 2005
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments below.

From: Hanson, Robert
Sent: Monday, June 20, 2005 12:48 PM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Couple more: Mack spoke with Heller? Don't have evidence of this. See 2 below and then 1) below that, if he's taking with Heller doesn't that go a long way to implicating him? Agreed but no evidence. I still don't get 4) below. When was Mack investing in the funds and how much. Don't have any records showing amount of all investments, just the funds he invested in. But here's what we know from e-mails: Mack was an original investor in Pequot (1999) and invested in multiple funds and deals between May and August of 2001, the only time fame I have reviewed carefully. One investment was $5 million. Another was $1 million. I think another was for $5 million. There are references to others where amounts not stated. Also, where was Mack before CSFB? From March through start date with CSFB, Mack between jobs but sometimes used Samberg's office in New York. Mack was with Morgan Stanley until March of 2001. Recent subpoena to MS asked for 1) all Mack (plus assistants') e-mails to PQ before he left in March and 2) all e-mail from MS staff to Mack aft r he left. Maybe that's where he learned about Heller. True.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 12:36 PM
To: Hanson, Robert
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments answers below

From: Hanson, Robert
Sent: Monday, June 20, 2005 11:16 AM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-thoeory.

Interesting stuff!

Couple questions:

1) Are you suggesting that we take Mack's testimony now before we get the documents or that we ask for more documents from CSFB or both? Both If you want more documents from CSFB, what would they be? I need to draft language but I would want to get his contract (when signed? June?) and all documents that relate to his phase in (assuming it occurred in June), particularly any meetings with investment banking staff or any download he got from Wheatly, the CEO that was forced out. Keep in mind that he had confrontations with bankers when he walked in, including Quattrone.

2) How do we know that Mack spoke with Heller on June 29 (1 below)? Samberg e-mail of 6/30 saying he spoke with Mack the night before.

3) When did Samberg start buying Heller (3 below)? July 2, the Monday after Mack call.

4) On 5 below, was Mack personally investing in Pequot? Yes; he was an original investor. If so, when and how much? Don't know total, but e-mails in May-August refer to $5 million in one fund, plus more $ for Scout. How would he invest in the hottest deals? Directly, but hard to tell much more because e-mails cryptic and in code. He was investing in: "fresh start," "Baby C," and "distressed guys." Fresh start was some kind of spin-off from Lucent. And the hottest funds? During time frame, he put $5 million in one fund and wanted to put more in Scout (suspect he was did) which was on fire.

5) Do you interpret the e-mail quoted in 5 below to mean the minimum investment of $5 million to be waived for important industry contacts? Not sure. Samberg says more than $10,000,000 Did Mack then invest less than $5 million in partners? E-mail was not about Mack; it was communication to Zilkha that shows Samberg's state of mind on July 2, 2001.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 10:18 AM
To: Hanson, Robert
Subject: Pequot: Connecting the dots with the CSFB-Mack-Samberg-thoeory.

I think we should serve a second subpoena on CSFB seeking all documents regarding Mack's phase in with CSFB. Our

first subpoena was very narrow, seeking only e-mails to or from Mack and Pequot during June and July 01. A tougher question is whether to take Mack' story now or wait till we get all info from CSFB. I favor doing it now.

As a theory, the CSFB-Mack-Samberg best connects the dots for the path of the GE-HF tip. It has some gaps and uncertainties, but no inherent inconsistencies. If Mack learned from CSFB about Heller around June 29, I think the story would

be compelling. Here are the dots I see:

1) Samberg's aggressive buying of Heller suggests he received the tip shortly before July 2. Mack spoke with Heller on Friday evening June 29.

2) June 29 is also a logical time for Mack to learn about the CSFB's inventory of investment banking deals, including the Heller acquisition, given Mack's July 12 start date with CSFB. My inference, albeit on sketchy evidence, is that Mack committed to CSFB in early June;

3) Samberg's continued buying suggests that he was continuing to receive confirmation the acquisition would go through. Mack would likely have continued to get updates on GE-Heller and he continued to have contacts with Samberg.

4) With over $400 million in Pequot funds, an MIT graduate, and 16 years running hedge funds, Samberg was too rich, too smart and too experienced to take a tip from anyone h would not deeply trust. Mack met this criterion and had as much to lose and Samberg if they got caught.

5) Mack profited from being allowed to get in closed funds and in special Pequot deals. H was allowed to pour millions into Pequot's hottest deals and hottest funds in May through August 2001 when Pequot was managing over $15 billion in assets and funds were not accepting new money. As Samberg put it on July 2, the day he began trading in Heller, "the only fund open now is partners, and although the min is $5mm, we are always willing to make significant exceptions for important industry contacts."

[Bob: The term "industry contacts" appears more than 2000 times in PQ e-mails]

Incidentally, the above may also help explain Lynch's call to Paul. Incidentally, Lynch advised Mack on at least one Pequot deal. Mack wrote Samberg on 2/6/02 stating, "I have checked with Gary Lynch and he confirmed that there is no conflict for me as an original inv stor [in Pequot]." Mack also hired Lynch: Here's one newspaper account: "Mack hires include Gary Lynch, a former enforcement chief at the Securities and Exchange Commission, who is a vice chairman in charge of stock research and legal compliance, and Stephen Volk, 68, a former managing partner at law firm Shearman & Sterling, who was Mack's first hire and became chairman of CSFB."

Incidentally, Volk resigned from Shearman & Sterling in early June, suggesting that the Mack-CSFB deal was in place by then, which in turn means June 29 is a possibility when Mack learned about GE-Heller.

Gary

From: Kreitman, Mark J.
Sent: Tuesday, February 22, 2005 3:23 PM
To: Foster, Hilton
Cc: Aguirre, Gary J.; Ribelin, Eric; Hanson, Robert
Subject: RE: Pequot--Prem Lochman

Thanks, Hilton.
That helps.
If we can interest the Southern District again, that should be a very high priority.
Mark

-----Original Message-----
From: Foster, Hilton
Sent: Tuesday, February 22, 2005 3:21 PM
To: Kreitman, Mark J.
Cc: Aguirre, Gary J.; Ribelin, Eric
Subject: RE: Pequot--Prem Lochman

Gary is basically saying that it probably won't be very productive to talk to Lachman at this time since Lachman is aware of the authorities' interest in his possible involvement in illegal trading or tipping.

I think Gary agrees with me that a good way to 'squeeze' or put pressure on Lachman is to get some important evidence on him from a review of his phone records or thru other means.

As I understand it, SDNY put the inquiry on hold because the SDNY did not have any securities trading to look at. If we can work backwards from Pequot's trading and connect it, directly or indirectly to Lachman, then we might have something to run with.

When Gary says that Lachman's credibility is zero, Gary is not saying that he believes that Lachman did not pass the tip or rumour. He is saying that Lachman backed off his story because Lachman thought that his purported tippee talked to the authorities and was thereafter wearing a wire.

Hilton

From: Samberg, Art
Sent: Thursday, March 01, 2001 10:06 PM
To: Levit, Carson; Schendel, Jerry
Subject: FW:

comments by david zilkha on microsoft.

-----Original Message-----
[redacted]davidzil@microsoft.com]
Sent: [redacted]
Subject: RE:

Hi Art,

Thanks for the e-mails and the offer letter which I received today after I had left my message for you - pediatrician and tax preparation appointments had kept me off e-mail from 1pm yesterday until this afternoon.

My sense is that the worst is over for Microsoft, short of being dragged down by the NASDAQ loosing another 400 points which I think it might.
Windows 2000 is beginning to gather momentum by winning in some important accounts (Chase, etc). I also know that the Win2000 scalability and reliability message is strong (NCR's Terraserver, which runs the world's biggest application, runs on our platform) and that MSFT's biggest challenge here is to win the marketing/perception battle against Sun and the other flavors of Unix/Linux. As for the other parts of the business, profits (and sometimes revenues) are still a way off so at this point investing in MSFT is primarily a bet on W2K, Win Millennium and Office XP. (I consider Office to be a no growth business at this point, but about to be reinvigorated as a .Net service.) That said, at this price, one isn't paying very much for the option value on the upcoming technologies and products: X-Box, Wireless Exchange, MSN Broadband, MSTV, etc.

Hope this helps,
David

PS: As Wendy may have told you, I would like to get some clarity on how I will work with any existing software and media analysts at the firm (which I presume there are).

-----Original Message-----
[redacted]ilto:art@pequotcap.com]
Sent: [redacted]7:25 PM
Subject: FW:

[redacted] the market is incredible, with the ndx down around 60% since sept 1st. things don't look so hot fundamentally, but i have a hunch the momentum is carrying too far on the downside, just as it did on the upside a year earlier. we've been n t short in the funds most closely correlated to the nasdaq market, and are doing quite well overall. although pequot is a stock specific, research driven shop, i started to buy msh calls today, shorting djii puts against them as disaster protection against a further decline in the ndx that could lead to a market meltdown. it's gotten too easy to short. as you can see below, i'd like to buy a couple of stocks. [redacted]

> -----Original Message-----

From: Sambera, Art
Sent: Monday, April 30, 2001 9:13 AM
To: Zilkha, David
Subject: RE: MSFT, Earthlink and At Home

those contacts have any views on the direct tv - murdoch - rumored msft possible deal?

-----Original Message-----
From: Zilkha, David
Sent: Sunday, April 29, 2001 2:18 PM
To: Zilkha, David; Lamorte, Ronald; Schendel, Jerry
Cc: Sambera, Art; Levit, Carson; Patil, Jared
Subject: RE: MSFT, Earthlink and At Home

I heard back from MSFT's VP of Internet Access (Ted Kummert) who made the following points in response to my question about whether it would make sense for MSFT to purchase Earthlink or Juno for their right to sell access into the AOL TW footprint, and possibly also team up with ATHM:

- MSFT has considered all these options and decided to pass on them all.
- Integrating access acquisitions isn't easy and MSN IA prefers to spend its resources and effort on partnerships where MSN gets value beyond incremental subs - like preferred pipe pricing with Qwest.
- MSN could have had an AOL TW deal at the same economics as Earthlink but passed.

-----Original Message-----
From: Zilkha, David
Sent: Wednesday, April 25, 2001 1:39 PM
To: Lamorte, Ronald; Schendel, Jerry
Cc: Sambera, Art; Levit, Carson
Subject: MSFT, Earthlink and At Home

Following my conversations with Ron and Jerry yesterday about Earthlink, I did a little more thinking last night about Ron's proposed scenario (MSFT buys ELNK and ATHM) that I wanted to share.

MSN's primary management goal and metric is to increase the number of "committed users" (CUs), defined as MSN users who are registered through either Hotmail, Passport, Messenger or other accounts (such as MoneyCentral portfolios), and who spend either 60 minutes or more on the network per month or log on 15 days or more per month, and who bought something from MSN or a commerce partner in the last 30 days. 7.45 million out of MSN's 218 million worldwide users (3.4% of the total) qualified as CUs in Feb. According to my former colleague in charge of MSN planning whom I spoke to last night, there was no difference in the proportion of access vs non-access customers that qualified as CUs, which lends strength to the sizable camp at MSN that believes the company should get out of the access business. As for the ongoing debate around acquiring Earthlink (which started in May last year), my colleague believes that 80% of Earthlink's customers visit MSN already and so an acquisition would do little to increase the CU count. In addition the VP of MSN Access, Ted Kummert, has been a strong opponent of acquiring ELNK from the outset because of both network integration issues with UUNET who currently run the MSN network, and the belief MSN can increase the CU count better through other uses of capital.

As for ELNK's right to sell broadband access into the AOL TW footprint, MSFT isn't currently prepared to increase its commitment to a money losing business like BB access right now even if it is the right thing to do strategically for the long run. So any deal with ELNK and ATHM would have to be P&L neutral under current company policy. Hank Vigil is the VP who deals with ATHM and I will try and get a sense from him about whether he has thought about Ron's proposed deal.

Hope this is of some interest to y'all.
David

From: [redacted]
Sent: Sunday, June 17, 2001 9:35 PM
To: [redacted]
Subject: FW: MSFT

fyi

-----Original Message-----
From: [redacted]
Sent: Friday, June 15, 2001 4:45 PM
To: [redacted]
Subject: [redacted]

[redacted]

1. [redacted]

2. [redacted]

[redacted]

On another note, Maria tried to register me for the MSFT analyst day and was told we are only allowed one attendee per company. Seema is already registered from Pequot. Thoughts?

David

From: Zilkha, David
Sent: Tuesday, June 19, 2001 8:23 AM
To: Samberg, Art
Subject: Buying ORCL

You could do more ORCL for a trade if you want the performance boost. It's a pretty safe 15-20% from here. I'd buy before the open if the liquidity's out there.

Thanks for the Sherlund feedback which I assume applies to the sell side in general. Exactly what I wanted to get your take on.

-----Original Message-----
From: Samberg, Art
Sent: Monday, June 18, 2001 10:27 PM
To: Zilkha, David
Subject: RE: ORCL, MSFT

so I guess I should go along in my normal 1:2 ratio in the orcl order. as to msft, I don't want to be associated with anything that sherlund does. if, after talking to you he feels comfortable with the stk, fine, but we absolutely should not be relaying info to him about what you learn via contacts within the company.

-----Original Message-----
From: Zilkha, David
Sent: Monday, June 18, 2001 7:27 PM
To: Samberg, Art; Schendel, Jerry
Subject: ORCL, MSFT

Joe is currently working on the official ORCL earnings mail. After talking to Rick Sherlund following the Q&A, Seema, Andy Kaplan and he decided to buy some tomorrow at the open, up to $17 - 16.00/share.

I agree with them that the stock will move up from here ($15.00 - 16.00) and that downside is limited, short of a market meltdown. I also concur that the thesis for holding onto it beyond a 30% pop is whether ORCL appears to be gaining momentum in a fortnight in the applications space which was down 40% YoY.

MSFT should also be a beneficiary of ORCL's positive noises about software. I told Sherlund on the call that MSFT was anticipating beating earnings for the Q as of last Thursday. He asked me whether he could put out a note talking up MSFT. I told him I'd let him know tomorrow after I heard back from my contact - and had gotten your take on what we'd like him to do.

David

From: Sainberg, Art
Sent: Saturday, April 07, 2001 9:06 AM
To: Chicosky, Wendy
Cc: 'davidzil@microsoft.com'
Subject: FW: Checking in

plz get david into the hambrecht conference.

-----Original Message-----
From: [redacted] [mailto:davidzil@microsoft.com]
Sent: [redacted] 1:53 AM
To: [redacted]
Subject: RE: Checking in

Great. Can Wendy add my name to the H&Q guest list and book me into the hotel you are staying in?

Will you be in NY the week of the 23rd? I want to take this week to update my company database as per the latest quarterly reports and figured I would do it in NY if you are around. Otherwise I could just as easily do it from Redmond, and then come to NY the week after the H&Q conference. Any preference?

[redacted]

I talked to Karen about going to FL this coming week and unfortunately it looks as if it won't work. Our only 24-hour help since the twins were born has been Karen's mother who needs to go back to LA this week for just one week. (The good news is that she will come to NY with us while we get settled.) Apologies for not being able to make this (certainly not because of lack of interest); perhaps I could go out to FL for their demo after the H&Q conference?

David

-----Original Message-----
From: [redacted] mailto:art@pequotcap.com]
Sent: [redacted] 11:15 AM
To: [redacted]
Subject: RE: Checking in

david

sounds like your life has been as hectic as mine during the last couple of weeks. you can start as early as you'd like. i'm going to go to the hambtech conf as well, so we can sit in on some meetings together. should be a good week for you, asw you can commute to seattle each weekend.

you are right - the article got the locations wrong. we keep the ny space we met in, as well as ct and our new london office. we willmove our venture guys to sand hill road from sf.

[redacted]

also, i have bought some macrovision, and if you'd like to get a head start on that i can send you some reports, etc. one other thing. i will send you an email jim mcniel of our venture group sent me about silverstream software, a public company that i foolishly bought at $25, down from $125, that now sells for $9! as jim notes, at that price it's selling at cash per share, and is beginning a new product cycle. i'm doubling down in my

taxable partnership, with the aim of selling the high cost stock in 31 days to avoid the wash sale rules. as jim notes, there is a user group meeting in florida next week, where they will launch their new products. any interest in going?
if so, we'll work out the logistics for you.

art

-----Original Message-----
From: David Zilkha [mailto:davidzil@microsoft.com]
Sent: Friday, April 06, 2001 5:06 AM
To: art@pequotcap.com
Subject: Checking in

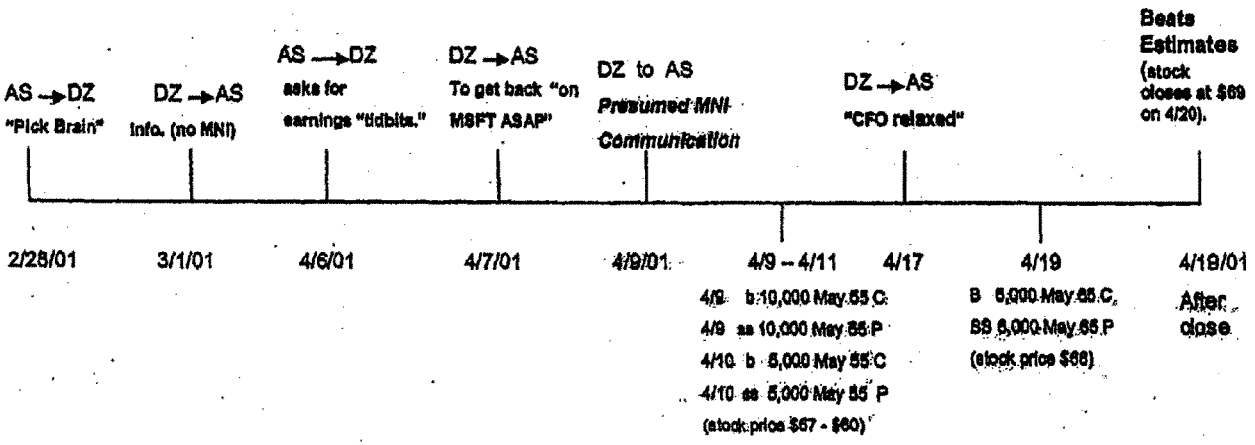
Hi Art,

Really looking forward to starting work, and actually wondered if I could begin a week early (on Monday April 23) and then attend the H&Q Technology Conference the following week? Can you get me invited to this? I had my bid on a co-op within walking distance of work accepted by the seller last week, and on Monday sent in my 10% deposit. However I didn't realize the whole rigmarole with board approval in NY and now realize that we won't be able to move in until mid June. Hence the unanticipated downtime and why I'd like to start a week early.

Saw the articles in the papers about the changes at Pequot. Sounds like the parting of ways will be pretty amicable, after all. I trust that the report that your group will work out of CT and leave Benton in NY was not totally accurate. If it is, please let me know ASAP so I can rework our housing situation (and try and get my deposit back!).

On the family front, things have been as exhausting as one might expect from jumping into the deep end with twins. Unfortunately our daughter quickly developed very back acid reflux and until we took her to the specialist spent most of her waking hours crying. By contrast, our son has already breeched the 12 pound barrier and is progressing from strength to strength (quite literally).

Hope you're well,
David



SEC: Privileged and Confidential

From: Samberg, Art
Sent: Friday, April 20, 2001 10:30 AM
To: David Zilkha (E-mail)
Subject: FW: Microsoft FQ3 (March) Results

david.....our tech group has a very dim view of pc demand, and consequently msft. in fact, they are short the stock in one account, while it is my largest long. (i shouldn't say this, but you have probably paid for yourself already!) joe bousaba is a good guy, and a nice guy. i'll try to hook you up with him next week.....art

-----Original Message-----
From: Samberg, Art
Sent: Friday, April 20, 2001 10:25 AM
To: BouSaba, Joe
Subject: RE: Microsoft FQ3 (March) Results

joe.....david zilkha joins me monday from microsoft. you might want to talk to him about what he thinks is going on at the company. if so, let me know.....art

-----Original Message-----
From: BouSaba, Joe
Sent: Friday, April 20, 2001 7:34 AM
To: TechCall
Cc: Samberg, Art
Subject: Microsoft FQ3 (March) Results

Revs of $8.5b vs. Street and our estimate of $8.1b.
EPS of $.44 ahead of Street consensus of $.42 and our estimate of $.41

Conclusion: A solid quarter fueled mostly by strength in Desktop Platforms (W2K Professional) and the recognition of Deferred Revs from prior quarters in the OEM channel. Guidance for next Q comes down 1-2c and FY'02 stays pretty much unchanged on the top-line. Street estimates may come down a few cents on the bottom line given prior consensus of $1.95 and the guidance of $1.90-1.94, but there was a broad range and a few analysts at the low-end will probably bring numbers up. This guidance for FY02 assumes the economy doesn't deteriorate further, and we feel there are clearly some risks there. We are taking our FY02 estimate up 2c to $1.81 but are still well below Street reflecting our view that uptake of XP will be slower than expected(CIOs not likely to spend on XP and launch could be delayed) and a slowdown in Windows Server (bad comps and increasingly competitive environment). W2K strength was somewhat surprising but attributable to the deferred revs from prior quarters this will fall off in the next two or three quarters. At $68, the stock is trading at 40x '01 and '02 and we are projecting essentially no EPS growth for CY'01 or CY'02. Despite the valuation, the stock is likely to go up since it is viewed as a safe haven, investors consider the estimates "safe" since they gave very clear guidance and newsflow will be positive. We still need to do more work on this stock.

- Windows XP is a risk: they need to finish the product on time because a delay of the launch (past the end of the summer) would strongly impact sentiment and could be a risk to December nums. XP also at risk if consumer ends up weaker. Company doesn't think XP will drive a new PC cycle. We think it's probably the reverse....XP doesn't tick up until corporations decide they need to upgrade PCs.
- Deferred looked good, growing 19% but similar growth to last Q. Unclear where the strength

in deferred came from, but we think it is stronger than expected adoption of W2K (which could slow down despite this early traction)

- Comments on PC Demand:
  - Weak in the March Q -- around 3% y/y. Weakest in U.S., stronger in Asia, Europe slightly better than US. Business better than consumer for first time in several Qs
  - Some indicators that PC demand could be stabilizing but they think worldwide PC growth will be more like 5% for Calendar 2001 ("low single digits")

4/20/2001

From: Samberg, Art
Sent: Monday, April 23, 2001 8:42 AM
To: Broach, Mark; Schendel, Jerry
Subject: RE: one tech guy

our new guy, david zilkha, is in ct today, check him out. he's already got a great p&l based on his msft ;input.

-----Original Message-----
From: Broach, Mark
Sent: Monday, April 23, 2001 8:34 AM
To: Schendel, Jerry; Samberg, Art
Subject: one tech guy

he may be too expensive ($5mm last yr??) but software guy at csfb comes recommended: brent thill

McGee, William

From: Samberg, Art
Sent: Friday, March 14, 2003 10:24 AM
To: Patel, Shash
Subject: RE: Instant Messaging

I presume I can keep IM also. there are some impt people who are only on IM that I communicate with.

-----Original Message-----
From: Patel, Shash
Sent: Friday, March 14, 2003 10:19 AM
Subject: Instant Messaging

All-

Due to growing security concerns with public Instant Messaging (AOL, Yahoo, ICQ, MSN, etc); Pequot is looking to deploy a secure IM called, Reuters IM.

With ReutersIM you will have the ability to instant message Pequot employees as well as other folks in the financial industry that are also using the product and subscribe to the service. Those companies include, but are not limited to: <Goldman, CSFB, Merrill Lynch, etc>. A complete list is attached below which is growing.

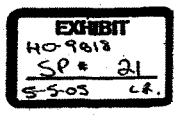
This is a secure platform. It does not tie in with other publicly available IM solutions (AOL, Yahoo, ICQ, MSN, etc). Subscription is required and accounts are managed by the entities that connect. This software is an excellent opportunity to provide an available, confidential platform for secure instant messaging within the financial industry. This mean Pequot's messages stay within Pequot and are always encrypted, unlike the other public IM's.

Currently everyone from the Technology team is using the new client. It is stable and intuitive...and you have the ability to connect over the Internet from any location in the world.

Please respond or call Support Services (x.2289) if interested. We'd like to extend this to other Pequot Employees and obtain your feedback.

Thank you.

Shash V. Patel
Pequot Capital Management
Information Technology Group
Shash@Pequotcap.com



Confidential Treatment Claimed under FOIA by
Fried, Frank, Harris, Shriver & Jacobson LLP

From: Samberg, Art
Sent: Wednesday, May 23, 2001 3:19 PM
T : Zilkha, David
Subject: RE: ITWO Update with IR

Of course. Works best when we use in, but with your active, and appropriate, meeting schedule that won't be happening near term.

-----Original Message-----
From: Zilkha, David <DZilkha@pequotcap.com>
To: Samberg, Art <art@pequotcap.com>
Sent: Wed May 23 02:43:24 2001
Subject: RE: ITWO Update with IR

Absolutely. Can you also let me know before entering a buy or sell trade on one of my recs? While I would agree that you should go ahead when you want to, I would like the opportunity to comment/advise on whether I would buy or sell at that particular time.

-----Original Message-----
From: Samberg, Art
Sent: Wednesday, May 23, 2001 12:42 AM
To: Zilkha, David
Cc: Dartley, Peter
Subject: RE: ITWO Update with IR

sold it last week. i've got to setup a system whereby you get messaged from trading on what positions of yours are being bot and sold

-----Original Message-----
From: Zilkha, David
Sent: Wednesday, May 23, 2001 12:40 AM
To: Samberg, Art
Subject: FW: ITWO Update with IR

Art, my gut tells me that this is not the right time to own it. Don't know if you still own it but I'd prefer you to put your software money elsewhere.

-----Original Message-----
From: BouSaba, Joe
Sent: Tuesday, May 22, 2001 12:59 PM
To: TechCall
Cc: Samberg, Art; Zilkha, David
Subject: ITWO Update with IR

Conclusion: An incremental downtick on ITWO from the company, which comes only 2 weeks after the last comments we got from the company around its analyst day which were positive. We spoke with IR just now, trying to gauge where we might be under-estimating ITWO's fundamentals, but overall the head of IR sounded a lot less positive this time around. The next step for us is to speak with Bill Beecher, the CFO in a week or so to gauge his tone (should prove helpful) and also with our new sales contact at the company. We realize that it is still early in the quarter to definitively conclude that this quarter for ITWO will come in lower than investors expect (we are at the low end of guidance and the market expects more at this point), but this incremental downtick from

the company along with other recent negative datapoints we have picked up on ITWO makes us feel more comfortable with our short position despite the stock's recent run-up. The highlights from our call are below:

* Customers (even existing customers) are feeling the same as last quarter about how economy is impacting their spending on ITWO. Across all verticals there are the same issues and ITWO hasn't seen any one vertical come back much stronger than the others. This is the case in the US and Europe
* The pipeline continues to grow, there is still activity, BUT the big question is whether customers will sign this quarter, maybe a little this Q and some next Q, it is very unclear. (he specifically posed this questions to us)
* Regarding the deals that might have slipped from last Q, most of those customers are just not ready to sign and if they didn't sign in the first few weeks of this Q then it will be just as hard to get them to sign at the end of this Q as last Q
* On April 18, when the company gave guidance, Greg Brady (CEO) thought it was overly conservative, now he feels better that the company gave guidance the way they did. IR says they're still OK with guidance but he did not sound as positive about it as he did a few weeks ago
* On the AMAT deal, the numbers out there of $40-80M are overblown relative to what they will likely sign in license revs. Not unusual for sales cycle to be contemplating a $30-40M project but would be scaled over several Qs if the customer goes ahead with plan

* AMAT deal would likely be around $5-6M near-term (negotiate the deal to a point and then customer will put a limit on the project based on their budget). Very few customers will commit to a $30-40M deal in one quarter

*

He doesn't think discounting software will work in this environment - sounds like they have tried it and still hasn't worked to close deals. Very interesting. This corroborates what we have heard from other sources about discounting but this is new news directly from ITWO about it not working that well

*

Said there is more room to go on cost side (which is why they did not give out formal EPS guidance). While the CFO had said a few weeks ago that we would not hear any announcements about more layoffs, IR said that the CFO has recently been challenging people in the company to reduce headcount

*

Overall in both the US and in Europe, business is being scaled back by customers

*

We had scheduled a call with ITWO Europe which the company cancelled, reason IR cited was that Europe won't have anything new to say since business there is the same as or a bit worse than the US

*

Europe is seeing the same customer reluctance to sign big deals as in the US

*

Europe trends are better in that they have caught up a bit to US - were way behind before. Seeing more activity than have before but demand still same. We had thought of Europe as an area of relative strength last Q, so this was an interesting data point

*

Mentioned Tyco, Siemens, Clarks, British American Tobacco as European customers in Q4 and Q1, but could not name one new customer in Europe that has signed a deal with ITWO this quarter

PCM-04-002067

GJA – 00537

Gary Aguirre

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 12:12 AM
T : Berger, Paul
Subject: Mack Testimony

Paul:

You had requested my analysis why John Mack's testimony should be taken. I had delayed sending it to you in hopes that Mark would be open to this possibility. However, Mark recently told me *again* that I would have to establish that Mack went over the wall before I could take his testimony. This does not make sense to me or to other staff. I am therefore submitting my analysis directly to you.

I will also be sending you the memo I mentioned during our discussion in my office in mid-July, dealing with the factors that led up to my resignation. I have not had time to prepare it because of the demands of Pequot, my EEOC brief due on August 15 and my scheduled vacation.

Gary

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:34 PM
To: Hanson, Robert
Subject: Mack testimony

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information.

The first element is whether Mack had possible access to information that GE would make a tender offer for HF. He had access from two sources: he had been the CEO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time. Also, CSFB was "wooing" Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or CS to mention, as part of this wooing

process, what inventory Mack would be taking over. Incidentally, we know how Samberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HF during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team as Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller.

a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million info Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "busting his chops" Samberg's chops because he had not got the documents on this investment. Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.
b) *Board seats* As shown on one of the spreadsheets, Samberg was promoting Mack for board seats on both Baby C and Fresh-start.

c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.
d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."
e) *Friendship* Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo.
f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Samberg had a relationship of trust deep friendship with Mack.

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend.

In July 2001, Samberg's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, [redacted], and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and ***I did things in a manner that was expedient at the time given my expertise in this area.***

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. ***Times were fragile.*** I needed their approval to do whatever I wanted to do ***or they might walk*** (emphasis added).

There do not appear to be other leads in the Samberg e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Samberg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Samberg's circles.

Gary

1/15/2006

Gary Aguirre

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 7:20 AM
To: Hanson, Robert
Subject: Ferdinand Pecora

Bob:

I mentioned last night that Ferdinand Pecora was chief counsel for the Senate Committee that drafted the 1933 and 1934 Acts, including the key operative language of Section 10(b). Those hearings eventually were named after him, the Pecora Hearings. Pecora warned in his opening words in Wall Street under Oath:

"Under the surface of the governmental regulation of the securities market, the same forces that produced the riotous speculative excesses of the 'wild bull market' of 1929 still give evidences of their existence and influence. Though repressed for the present, it cannot be doubted that, given a suitable opportunity, they would spring back into pernicious activity. Frequently we are told that this regulation has been throttling the country's prosperity. Bitterly hostile was Wall Street to the enactment of the regulatory legislation. It now looks forward to the day when it shall, as it hopes, reassume the reigns of its former power. . . ."

When the SEC declines to question "industry captains," when an investigation suggests it is the next logical step, we are granting them a pass to play the trading game by their own rules. We do the same when we set artificially high barriers to question them that do not exist for others, e.g., don't question them about going over the wall until we proved they have already made the trip.

I don't think Pecora was suggesting that regulatory scrutiny be delayed until we have another market collapse. I do not think he would have delayed a heartbeat before taking John Mack's testimony on the record in this matter. Mack had multiple motives, Samberg's trust, contact with Samberg at the key moment, and two possible sources for the tip. He should be asked the obvious questions.

Gary

Gary Aguirre

From: Aguirre, Gary J.
Sent: Wednesday, July 27, 2005 5:22 PM
To: Berger, Paul; Kreitman, Mark J.
Subject: Re: Mark's e-mail of July 25
Attachments: Mack 13.doc; GJA Mack 11.xls; GJA Mack 12.xls; Mack 1.doc; Mack 2.doc; Mack 3.doc; Mack 4.doc; Mack 5.doc; Mack 6.doc; Mack 7.doc; Mack 8.doc; Mack 9.doc; Mack 10.doc; Mack 14.doc; Mack 15.doc

Paul and Mark:

This replies to Mark's e-mail of July 25, which in turn replied to mine of June 28 (attachment 13): I wrote and sent my e-mail immediately after a heated discussion with Mark on June 28, memorializing what had transpired. I do not understand why it would take four weeks to respond. I am also copying Paul because the timing of Mark's e-mail suggests it was triggered by my conversation with Paul on the same points late last week. Mark's July 25 e-mail reads:

> **From:** Kreitman, Mark J.
> **Sent:** Monday, July 25, 2005 7:15 PM
> **To:** Aguirre, Gary J.
> **Cc:** Hanson, Robert
> **Subject:** RE: Mack and CSFB subpoenas
>
> I need greater specificity than the information provided here. Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall, is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view. The contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational. The fact that we have not identified other potential tippers is of only marginal significance. Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. The evidence of motive Mark cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. I have clarified the role of Irv and Larry, which should assuage your anxiety to some degree. I have at no time "denied [your] my request to proceed with the CSFB . . . subpoena." To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the sine qua non for focused investigation of Mack.

For ease of reference, I have separated the Mark's comments made in his e-mail of July 25 into sub-points and then respond to each sub-point in the bracketed comments.

1) I need greater specificity than the information provided here. [My June 28 e-mail was not intended to specify the factual support for the Mack testimony-CSFB subpoena course of action. It merely confirmed my understanding that Mark had rejected both courses of action during the heated meeting we had a few minutes earlier. The factual support for these two steps was discussed in the two lengthy e-mails and two spreadsheets I gave Mark on June 27 and June 28

(see attachments 9-12) and to lesser extent in the series of e-mails that I had circulated since June 3 when it was announced that Mack would become Pequot's new CEO (attachments 1-8).

2) **Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal.** [Not likely: all communications regarding Mack's position at CSFB during the critical period before July 2 were between Mack and Credit Suisse Group Chairman Lukas Mühlemann **in Switzerland**, except for two meetings with CSFB CFO and a CSFB attorney. The July 30, 2001, Business Week discussed how Mack went to CSFB: "**Since April, he** [Mühlemann] had been wooing Mack--who left Morgan Stanley on Mar. 21 after losing a power struggle with CEO Philip J. Purcell--to take on one of the toughest jobs on Wall Street." So far, despite my request, CSFB has not produced anything to or from its Swiss parent regarding Mack. When I ask about it, his underlings tell me Lynch is looking into it. Patalino has politely suggested: "Why don't you get it from Mack?" (See attachment 14) Until we talk to Mack, we don't know who he might have spoken with at CSFB before he was hired. CSFB has expressed reluctance to restore all backup tapes for all employees for the period from April through July 2001 and I have not asked them to do this.

3) **The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall, is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view.** [There was no wall to go over before. The question is: did anyone tip him off during the period that Mühlemann and CSFB's CFO were wooing him to go to CSFB. Nor need the subpoena be intrusive; it could be handled very smoothly: a short session during which we simply ask if and when he found out about the acquisition. The other possible source is Morgan Stanley. Currently, we are exploring possibilities at CSFB and Morgan Stanley. Mack's testimony, as I explained in our pre-meeting memo of June 28 (attachment 10), could have helped us focus our investigation.

4) **The contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational.** [We have four Mack-Samberg contacts during April through July 2001. One was on the Friday night before Samberg started trading his trading on the next Monday.]

5) **The fact that we have not identified other potential tippers is of only marginal significance.** [If we had just begun to look, I would agree. I have been through Samberg's personal calendar, what phone records we have, all his e-mails for the relevant period, searched through about the million Pequot e-mails for 2001, questioned Samberg about his relationship with everybody involved on all sides of the deal (JP Morgan, CSFB, Merrill Lynch, GE and Heller) in the deal. I have looked through all relevant CSFB e-mails and Morgan Stanley e-mails. There are no connects. Nor is there anything else to suggest that he learned from any of these people. I have screened possible connects on the acquisition teams through the 3.5 million Pequot database to look for leads. There were none. The tipper must connect a lot of dots: access to info, motivation at the key time, trusting relationship with Samberg, communications at key time with Samberg. No one else connects these couple of dots; Mack connects all of them.]

6) **Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts.** [It's not the trust factor in isolation as Mark suggests; it's one factor in a profile. Suppose an eye witness describes his assailant as a 6'1" white male, weighing over 300 pounds, balding with a common tattoo on his forearm. It does not make everybody with the same tattoo a suspect. Just the same way, the tipper must meet the whole profile: have possible access to information, and spoke with Samberg at the key time, had a motive, and was trusted by Samberg. Mack does not simply have the common tattoo on his arm; he meets the whole profile.]

7) **The evidence of motive Mark cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern.** [As discussed above, the June 28 e-mail, to which Mark responds, was not intended to specify the details regarding motive. That was done in the memos and two spreadsheets I gave Mark just before the meeting (attachments 9-12). In general, I do not believe that Mack's tips to Samberg would have been on transactions where they split a profit. That's too crude and created unnecessary risk. More likely, they just did favors for each others like some of those discussed below.

   a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. Mack was pouring money into these funds in 2001, even though all (but one) were closed. In general, the funds had a $5 million lower limit. E-mails show Mack putting at least $13 million into these funds. This included the Scout fund which had the highest return but was closed at that time. Scout is also one of the three funs that consistently appear on the SRO referrals. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds. Similarly, Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million info Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.
   b) *Board seats* As shown on one of the spreadsheets (attachment 12), Samberg was promoting Mack for board seats on both Baby C and Fresh-start.
   c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.
   d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."
   e) *Friendship* Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo (attachment 9).

8) **I have clarified the role of Irv and Larry, which should assuage your anxiety to some degree.** [This was done after I resigned and only after Jim Eichner disagreed with Mark on the same issue.]

9) **I have at no time "denied [your] my request to proceed with the CSFB . . . subpoena." To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the sine qua non for focused investigation of Mack.** [I'll be specific. I proposed in my 6/20 and 6/24 e-mails (see yellow highlighted language in attachments 3 and 8) to Bob that we serve a second subpoena on CSFB. When I did not get an answer, I asked Bob about it. He said it was Mark's decision. I therefore included my request to broaden the CSFB subpoena in my June 28 e-mail to Mark: **"My view is that we should broaden the subpoena to obtain (1) all communications between Mack (we now have his e-mail address just before he started with CSFB) and CSFB for the two months before he began with CSFB and (2) all documents relating to his phase in as CEO at CSFB generated during June and July 2001.** Further, I think we need to take Mack's testimony and simply nail down whether he will admit that he knew about the GE/HF acquisition from any source." Mark said he had read the above memo before we spoke on June 28. He made

clear to me that he disagreed with what I had proposed. I first learned that Mark had changed his mind after I told Bob I was resigning.]

I also believe Mack's testimony should have been taken promptly for the same reason that staff normally takes early testimony of suspected participants in an insider trading investigation--to pin them down. This is particularly true here because CFSB and Morgan Stanley are still producing e-mails. Further Morgan Stanley will be friendly because Mack is now its CEO. CSFB will be friendly to Mack because Gary Lynch, who is going to Morgan Stanley in a couple of months to join Mack, controls the CSFB production responsive to our subpoena. Further delay allows Mack to concoct a story that is consistent with the information contained in the e-mails. On the other hand, if he did not provide information, that also may become clear. As discussed in my June 28 e-mail to Mark (Exhibit 10), this would allow us to focus on other possible sources for the tip.

I had different and more troubling input why it was difficult to move ahead with the second CSFB subpoena and the Mack testimony. I sent two e-mails to Bob during the week of June 20 (see attachments 3 and 8) proposing that we proceed with the Mack testimony and broaden the CSFB subpoena. When I did not hear back from Bob, I spoke with him directly about these proposals. Bob told me 1) that these decisions were for Mark to make and 2) it would be an uphill battle because Mack had powerful political connections. Bob also mentioned this concern during a meeting with Mark and me. Bob's comment about Mack's political influence became more real when I learned on June 27 that documents I had subpoenaed from Morgan Stanley were faxed by Mary Jo White (who had never represented anyone in the investigation) directly to Linda Thompson (see attachment 15), before Morgan Stanley produced them in the investigation. On the preceding Friday, June 24, Bob also met privately with Paul about the investigation I was handling. Likewise, Mark and Bob did not invite me to participate in the meeting on June 27 when they discussed Mack's possible testimony. This combination of events suggests to me that the issue whether Mack's testimony would be taken was being handled differently than the same issue for other witnesses in this investigation and different from the same issue in other investigations. Further, I do not believe that treating Mack differently is consistent with the Commission's mission, at least as I understand it.

My comments above deal with one situation that I found very demoralizing. I am preparing a second memo-e-mail addressing other events that will place the above in perspective.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

From: Kreitman, Mark J.
Sent: Monday, July 25, 2005 7:15 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert
Subject: RE: Mack and CSFB subpoenas

I need greater specificity than the information provided here. Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall,

is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view. Th contacts between Mack and Samberg, though potentially significant, are not, as I und rstand it, aberrational. The fact that we have not identified other potential tippers is of only marginal significance. Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. The evidence of motive you cite may have substanc , but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. I have clarified the role of Irv and Larry, which should assuage your anxiety to some degree. I have at no time "denied [your] my request to proceed with th CSFB . . . subpoena." To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the sine qua non for focused investigation of Mack.

From: Aguirre, Gary J.
Sent: Thursday, June 30, 2005 9:29 AM
To: Kreitman, Mark J.
Subject: FW: Mack and CSFB subpoenas

Corrected e-mail sent yesterday

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

From: Aguirre, Gary J.
Sent: Wednesday, June 29, 2005 5:11 PM
To: Kreitman, Mark J.
Subject: Mack and CSFB subpoenas

Mark:

As you know, I have asked to issue a subpoena to CSFB and to take the testimony of John Mack in connection with Samberg's $80 million trades in GE and Heller shortly before the public announcement of the GE's acquisition of Heller. I suggested in my e-mail to you of June 27 in summary fashion why Mack was a logical source of the tip and also suggested in my memo of June 28 that this was the next logical step in this investigation.

The reasons are the following:

1) Mack had access to this information from two sources, since he had recently left Morgan Stanley, which represented GE, and moved to CSFB, which represented Heller;
2) Mack had communications with Samberg on at least two critical times during the Samberg's trading, including a call after the close on the Friday before the Monday when Mack began trading; we have no other leads at this time of people who likely knew of the acquisition that had contact with Samberg shortly before he began trading;
3) I have questioned Samberg about all individuals who were identified in chronologies who had knowledge before July 2, 2001 of the Heller

acquisition, and Samberg denies he had contacts with any of them; this suggests that the tipper was not directly involved in the acquisition;

4) Samberg would likely have a relationship of trust with the person from whom he accepted the information, Mack meets that criteria,
5) There were a number of motives for Mack to pass this information along to Samberg:
    a) Mack was admitted directly into Pequot deals, e.g., the night that Mack is suspected of giving Samberg the tip, Samberg arranged for Mack to get a $5 million piece of a Lucent investment subsidiary that was being sold at a fire sale;
    b) Mack got to put at least $7 million (likely much higher) into Pequot funds that were closed; these funds had sensational returns at that time, including $5 million into one of the funds that was allocated 5.4 million in profits from GE-HF;
    c) Samberg was proposing Mack as a director on two boards;
    d) They were very close friends, e.g., Samberg's secretary says "Mack loves you"; Samberg was in desperate need at that time for some big hits, since his all star protégé was leaving about half of Pequot employees and Samberg was worried that more would leave;
    e) Mack solicited and obtained Samberg's stock tips;
    f) Other consideration that does not show up in the Pequot e-mails.

Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation. First, Bob has instructed me to stock with the GE-Heller investigation. The Samberg-Microsoft investigation is on hold until David Anders and the FBI speak with David Zilkha. That matter really depends on whether Zilkha tells the FBI that he tipped Samberg around April 9. If he does, David Anders will likely continue the matter as a criminal investigation. If Zilkha does not admit he tipped Samberg, we would have the same problem.

As I mentioned in my June 28 memo, the second best source of proving the Samberg GE tip is from the backup tapes. I am not permitted to speak with either Pollack or Storch, who are handling this matter and Audrey refers me to them. That effectively closed off this source. The other possibility is to take extensive testimony from Pequot employees in this regard. I have already taken five examinations trying to pin down this issue. Further, taking two weeks of testimony on this issue that may not be productive is not how I interpret Bob's guidelines.

I have proposed that we obtain the documents from CSFB that would show when Mack obtained information about GE-HF. I suspect that Mack learned during an orientation at CSFB. I would be looking for information that Mack knew about GE-Heller as well as information when Mack learned. Evidence that Mack learned near or on Friday June 29, the night of his call to Samberg, would tend to focus the matter more on Mack. Evidence that he did not learn until July 3 or never learned would eliminate him. From the newspaper accounts, I have inferred that there were some arrangements between CSFB [prior draft erroneously referred to Morgan Stanley] and John Mack in early June. This is consistent with an orientation later in the month during which Mack learned about the GE-HF matter, perhaps 10 days to 2 weeks before the public announcement that he was Morgan Stanley's CEO.

I understand you have denied my request to proceed with the CSFB and Mack subpoenas

Gary

----Original Message----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Ribelin, Eric <RibelinE@SEC.GOV>; Foster, Hilton <FosterH@SEC.GOV>; Eichner, Jim <EichnerJ@SEC.GOV>; Conroy, Thomas <CONROYT@SEC.GOV>; Glascoe, Stephen <GlascoeS@SEC.GOV>; Miller, Nancy B. <MillerNB@SEC.GOV>
CC: Hanson, Robert <HansonR@SEC.GOV>; Kreitman, Mark J. <KreitmanM@SEC.GOV>
Sent: Fri Jun 03 08:36:07 2005
Subject: Possible tipper new Pequot Chairman?

John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. Mack moved from Morgan Stanley, adviser in Heller acquisition, to CSFB, also adviser in Heller, in late July 2001, the month of acquisition. The are hundreds of Pequot e-mails referring to Mack, including a dozen in July 2001. See e-mail below between Samberg and his son referring to Mack ("It's nice to have friends in high places...:)" Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets? Please note the happy face which has already come up twice in relating to possible flow of insider info. Ironically, Mack's article quoted below is C-1 of WSJ, just as was when Samberg's exchanged e-mails below.

From: Aguirre, Gary J.
Sent: Monday, June 06, 2005 11:30 AM
To: Hanson, Robert; Eichner, Jim; Miller, Nancy B.; Foster, Hilton
Cc: Kreitman, Mark J.; Ribelin, Eric
Subject: John Mack correction

Mack left Morgan Stanley in March 01 and was working at CFSB by 7/12/01. He continues to be most likely candidate so far for various reasons: deep connections Heller info at MS, access to Heller info at CSFB, multiple relationships with Samberg in 01(close pals, investor in Pequot, discussed deals, phone call just Samberg began Heller trading, possible office at Pequot, and inch of 2001 e-mails).

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 10:14 AM
To: Hanson, Robert
Subject: Pequot: Connecting the dots with the CSFB-Mack-Samberg-thoeory.

I think we should serve a second subpoena on CSFB seeking all documents regarding Mack's phase in with CSFB. Our first subpoena was very narrow, seeking only e-mails to or from Mack and Pequot during June and July 01. A tougher question is whether to take Mack' story now or wait till we get all info from CSFB. I favor doing it now.

As a theory, the CSFB-Mack-Samaberg best connects the dots for the path of the GE-HF tip. It has some gaps and uncertainties, but no inherent inconsistencies. *If Mack learned from CSFB about Heller around June 29*, I think the story would be compelling. Here are the dots I see:

1) Samberg's aggressive buying of Heller suggests he received the tip shortly before July 2. Mack spoke with Heller on Friday evening June 29.

2) June 29 is also a logical time for Mack to learn about the CSFB's inventory of investment banking deals, including the Heller acquisition, given Mack's July 12 start date with CSFB. My inference, albeit on sketchy evidence, is that Mack committed to CSFB in early June;

3) Samberg's continued buying suggests that he was continuing to receive confirmation the acquisition would go through. Mack would likely have continued to get updates on GE-Heller and he continued to have contacts with Samberg.

4) With over $400 million in Pequot funds, an MIT graduate, and 16 years running hedge funds, Samberg was too rich, too smart and too experienced to take a tip from anyone he would not deeply trust. Mack met this criterion and had as much to lose and Samberg if they got caught.

5) Mack profited from being allowed to get in closed funds and in special Pequot deals. He *was allowed* to pour millions into Pequot's hottest deals and hottest funds in May through August 2001 when Pequot was managing over $15 billion in assets and funds were not accepting new money. As Samberg put it on July 2, the day he began trading in Heller, "the only fund open now is partners, and although the min is $5mm, we are always willing to make significant exceptions for important *industry contacts*."

[Bob: The term "industry contacts" appears more than 2000 times in PQ e-mails]

Incidentally, the above may also help explain Lynch's call to Paul. Incidentally, Lynch advised Mack on at least one Pequot deal. Mack wrote Samberg on 2/6/02 stating, "I have checked with Gary Lynch and he confirmed that there is no conflict for me as an original investor [in Pequot]." Mack also hired Lynch: Here's one newspaper account: "Mack hires include ◀ *Gary* ◀ *Lynch* ▶, a former enforcement chief at the Securities and Exchange Commission, who is a vice chairman in charge of stock research and legal compliance, and Stephen Volk, 68, a former managing partner at law firm Shearman & Sterling, who was Mack's first hire and became chairman of CSFB."

Incidentally, Volk resigned from Shearman & Sterling in early June, suggesting that the Mack-CSFB deal was in place by then, which in turn means June 29 is a possibility when Mack learned about GE-Heller.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 12:32 PM
To: Hanson, Robert
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments answers below

From: Hanson, Robert
Sent: Monday, June 20, 2005 11:16 AM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-thoeory.

Interesting stuff!

Couple questions:

1) **Are you suggesting that we take Mack's testimony now before we get the documents or that we ask for more documents from CSFB or both?** Both **If you want more documents from CSFB, what would they be?** I need to draft language but I would want to get his contract (when signed? June?) and all documents that relate to his phase in (assuming it occurred in June), particularly any meetings with investment banking staff or any download he got from Wheatly, the CEO that was forced out. Keep in mind that he had confrontations with bankers when he walked in, including Quattrone.
2) **How do we know that Mack spoke with Heller on June 29 (1 below)?** Samberg e-mail of 6/30 saying he spoke with Mack the night before.
3) **When did Samberg start buying Heller (3 below)?** July 2, the Monday after Mack call
4) **On 5 below, was Mack personally investing in Pequot?** Yes; he was an original investor **If so, when and how much?** Don't know total, but e-mails in May-August refer to $5 million in one fund, plus more $ for Scout. **How would he invest in the hottest deals?** Directly, but hard to tell much more because e-mails cryptic and in code. He was investing in: "fresh start," "Baby C," and "distressed guys." Fresh start was some kind of spin-off from Lucent. **And the hottest funds?** During time frame, he put $5 million in one fund and wanted to put more in Scout (suspect he was did) which was on fire.
5) **Do you interpret the e-mail quoted in 5 below to mean the minimum investment of $5 million to be waived for important industry contacts?** Not sure. Samberg says more than $10,000,000 **Did Mack then invest less than $5 million in partners?** E-mail was not about Mack; it was communication to Zilkha that shows Samberg's state of mind on July 2, 2001.

From: Hanson, Robert
Sent: Monday, June 20, 2005 8:25 PM
To: Aguirre, Gary J.
Subject: Re: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Okay Gary you've given me the bug. I'm starting to think about the case during my non work hours.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 1:41 PM
To: Hanson, Robert
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments below.

From: Hanson, Robert
Sent: Monday, June 20, 2005 12:48 PM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Couple more: Mack spoke with Heller? Don't have evidence of this. **See 2 below and then 1) below that, if he's taking with Heller doesn't that go a long way to implicating him?** Agreed but no evidence. **I still don't get 4) below. When was Mack investing in the funds and how much.** Don't have any records showing amount of all investments, just the funds he invested in. But here's what we know from e-mails: Mack was an original investor in Pequot (1999) and invested in multiple funds and deals between May and August of 2001, the only time fame I have reviewed carefully. One investment was $5 million. Another was $1 million. I think another was for $5 million. There are references to others where amounts not stated. **Also, where was Mack before CSFB?** From March through start date with CSFB, Mack between jobs but sometimes used Samberg's office in New York. Mack was with Morgan Stanley until March of 2001. Recent subpoena to MS asked for 1) all Mack (plus assistants') e-mails to PQ before he left in March and 2) all e-mail from MS staff to Mack after he left. **Maybe that's where he learned about Heller.** True.

From: Hanson, Robert
Sent: Wednesday, June 22, 2005 8:31 AM
To: Aguirre, Gary J.
Subject: RE: Good question yesterday

Good – that helps

From: Aguirre, Gary J.
Sent: Wednesday, June 22, 2005 6:04 AM
To: Hanson, Robert
Subject: Good question yesterday

I missed this: Mack got $5mm in Pequot Partners on either 6/1/2001 or 7/1/2001, either a month before or the day Samberg started buying HF and GE (see e-mails between Samberg and Pequot Marketing head below). Samberg put one third of GE and HF in Partners.

TO :
Clancy, Sheila [Pequot Marketing Head]
FROM :
Samberg, Art
DATE = 05/13/2001

he'd like to come in asap. are we going to open on 6/1?

-----Original Message-----
From: Clancy, Sheila
Sent: Sunday, May 13, 2001 9:23 PM
To: *Samberg*, Art
Subject: RE:

sure i will call him and i will ask mark about scout.....do you want him to come in on 6/1 or 7/1? mark....what do you think?

-----Original Message-----
From: *Samberg*, Art
Sent: Friday, May 11, 2001 2:31 PM
To: Clancy, Sheila [Pequot Marketing Head]

john *mack* would like to put $*5mm* into partners at the 1st available opening. he'd also like to put more $ into scout, if that's possible, and would like a recap of what he has where. you want to call him?

From: Aguirre, Gary J.
Sent: Friday, June 24, 2005 8:19 AM
To: Hanson, Robert
Subject: Broadening CSFB subpoena for Mack e-mails

Attached is Nancy's Samberg-Mack spreadsheet with a few edits.

CFSB has 500,000 Mack e-mails now ready to be searched. Production date, after extension, is now 7/8. Our current subpoena seeks:

1. All electronic mail to John J Mack ("Mack"), from June 1, 2001, through July 31, 2004, from any agent, officer or employee of Pequot Capital Management ("PCM");

2. All electronic mail from Mack, from June 1, 2001, through July 31, 2004, to any agent, officer or employee of Pequot Capital Management ("PCM").

Should we discuss broader search with them now to avoid repetitive searches? Also, I have found e-mail address Mack used just before he joined CSFB, which means we may want CSFB e-mails to and from this Mack address. **[GJA Second request to Bob to Broaden CSFB subpoena]**

Mack Pequot Holdings

Fund/Managed Account	Client Name	Current Investor in Fund?
Pequot Credit Opportunities Fund, L.P.	Christy K. Mack	Yes
Pequot Endowment Fund, L.P.	C.J. Mack Foundation	Yes
Pequot Healthcare Fund, L.P.	Christy K. Mack	Yes
Pequot Healthcare Venture Fund, L.P.	John J. Mack	Yes
Pequot Partners Fund, L.P.	John J. Mack	Yes
Pequot Private Equity Fund II, L.P.	Christy K. Mack	Yes
Pequot Private Equity Fund III, L.P.	C.J. Mack Foundation	Yes
Pequot Private Equity Fund III, L.P.	Christy K. Mack	Yes
Pequot Scout Fund, L.P.	Christy K. Mack	Yes
Pequot Special Opportunities Fund, L.I	John J. Mack	Yes
Pequot Telecommunications and Medi	Christy K. Mack	No
Pequot Telecommunications and Medi	John J. Mack	No
Pequot Telecommunications and Medi	C.J. Mack Foundation	No
Pequot Venture Partners II, L.P.	John J. Mack	Yes
Pequot Special Opportunities Fund II, I	John J. Mack	Yes

Samberg-Mack Key E-mails

Date	Action	Description
12/23/00	Email JJM to AS	JJM to invest $5 mil, possibly in scout, telecomm and h/c
02/13/01	Email JJM to AS	"Should Christy sell her Netegrity stock or keep it?"
02/13/01	Email AS to JJM	"Larry and I are keeping ours. Big things ahead."
04/11/01	AS Calendar Item	John Mack uses AJS office @PCNY
04/18/01	Email AS to Poch	JJM to use NY office for mtg "next Tuesday"
04/26/01	Email Jennings to AS	"JJM called, will try you at home tomorrow"
05/08/01	Email JJM to AS	JJM wants to put additional 5mil with PCM
05/09/01	Email AS to JJM	Asking JJM to put $ into BabyC ("direct investment opp.")
05/11/01	Email AS to SC	JJM to put "5mm to partners, and $ into scout"
05/17/01	Email WC to AS	JJM wants to put 1 mil in co buying BabyC (healthtech)
05/19/01	Email JJM to AS	JJM confirms 1 mil in co buying BabyC
05/28/01	Email JS to AS	Should JS accept JJM +1 mil (2 mil total) even though surplus?
05/28/01	Email AS to JS	"I'd definitely take john's money."
05/28/01	Email AS to JS	"I'd definitely take john's money."
05/28/01	Email AS to JS	JJM would be "great board member" re BabyC Acq. Co.
05/30/01	Dinner with J. Mack	Dinner at San Pietro, New York City
05/30/01	Email AS to Poch, Lenihan	JJM as board member for Freshstart?
06/04/01	Email AS to JJM	"Freshstart are very interested in you coming aboard"
06/20/01	AS dinner with JJM, McGinn	JJM hasn't received Freshstart materials yet.
06/26/01	Email D. Bucci to other admins	Earliest email mention of 07/19 JJM lunch re pvp hc
06/29/01	Email AS to Pock on 6/30	Presumed conversation between JJM and AS
06/30/01	Email JP to AS	JJM to put $5mil into Freshstart
06/30/01	Email Poch to AS	"great call with john mack last night."

From: Aguirre, Gary J.
Sent: Monday, July 11, 2005 8:46 AM
To: Hanson, Robert
Subject: CSFB subpoena

Spoke with Pat Patlino late Friday re CSFB subpoena. He remains cooperative, but, as we expected, was not sure CSFB will be able to obtain Mack-CS communications. Locating who Mack met with at CSFB will also be a challenge. His comment to me: "Why don't you get this stuff from Mack?" I am going to contact CS USA and subpoena Mack-CS communications. OK?

He asked if I would provide him with a copy of CSFB's NYSE submittal so he would not have to chase it down. With your approval, I provided Morgan Stanley with its submittal. I suggest we do the same with CSFB, since will likely point them in the right direction. OK?

From: Aguirre, Gary J.
Sent: Wednesday, June 29, 2005 5:13 PM
To: Kreitman, Mark J.
Subject: Morgan Stanley delivery

I have been informed by Fiona Phillips, who represents Morgan Stanley, that a CD is expected here this afternoon. When I told them that it could be delivered tomorrow, since the mailroom would be closed, she insisted that it be delivered today because "someone here was expecting it." That person is not me. I also understand that other documents from Morgan Stanley were sent directly to Linda Thompson and that there have been discussions between senior staff and counsel for Morgan Stanley. As I have told Bob, and stated in my memos, the most logical path of the information is from CSFB to Mack to Samberg.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

From: Samberg, Art
Sent: Saturday, June 30, 2001 1:41 PM
To: Poch, Jerry
Subject: RE:

As he might have mentioned, he called here looking for you. Cuz of our breakfast I remembered you were in vail and gave him your number. Glad this is moving along, and thrilled at the $5mm number. Are you in the ny/ct area the week after next? I'd really like you to meet the distressed guys I've uncovered.

-----Original Message-----
From: Poch, Jerry <JPoch@pequotcap.com>
To: Samberg, Art <art@pequotcap.com>
Sent: Sat Jun 30 12:58:11 2001
Subj ct: RE:

I had a group call with john mack last night. he wants to go forward with freshstart and put 5mm in. i will set up a meeting week after next with the la folks. we also chated about rich and i gave him my input. he was very appreciative and confirmed that his wife smelled a rat. by the way, he said he might have to lay bey initial customer contacts for freshstart from made days because he might end up heading another firm-merrill. i told him that was fine and thought you would be interested.

-----Original Message-----
From: Samberg, Art
Sent: Friday, June 29, 2001 9:32 PM
To: Schaedel, Jerry
Cc: Broach, Mark; Poch, Jerry; Lenihan, Larry; Clancy, Sheila; Obrien, Kevin; Dartley, Peter
Subject:

When I sent my email concerning a meeting next week I did nt realize the mkt would close at 1:30 and people would be leaving for vacations. What are your availabilities the week after next? Plz respond to wendy.

[redacted]

PCM-011-001896

GJA - 00491

Aguirre, Gary J.

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 12:36 PM
To: Kreitman, Mark J.
Cc: Hanson, Robert
Subject: RE: Pequot pending matters.

As I understand the term "over the wall," I do not think it applies here in its usual sense: someone within a securities firm going over the "wall" restricting access to non-public, material information. The tip to Samberg, assuming it took place, must have occurred before Mack started with CSFB. There will be no evidence in the classic sense that he went over the wall, as there was no wall at that time.

The question is whether GE-Heller acquisition was disclosed to Mack during the wooing period with CSFB. This will not be easy for two reasons. First, 90% was handled by Credit Suisse in Geneva which, as a Credit Suisse, is beyond the reach of our subpoena I have been working through CSFB to try to get them to produce CS's documents, and they sound cooperative. Second, all subpoena documents are passing through Lynch, who is going back to Morgan Stanley to join Mack. I am hearing a lot about privacy rights under Swiss law.

Patalino (CSFB contact) says Mack had two limited contacts with CSFB shortly before he started work He met with CSFB's CFO and an attorney two weeks before he started (around June 29) and again just before he started. Both dates are very significant in terms of Samberg's trading: June 29 is when Mack spoke by phone with Samberg, which is just before Samberg began trading in Heller. July 8-9 is the time frame when Samberg increased his buy on Heller from 15,000 to 400,000 shares, suggesting that his information was refreshed. This also correlates with the date that GE increased its offer for Heller.

Bottom line: evidence suggests that Samberg had his info refreshed on exact days that Mack met with CFO of CSFB. Item 8 is an effort to obtain information relevant to the possibility that info went to Mack during meetings with CSFB and CS. I am not optimistic, given the Lynch filter.

From: Kreitman, Mark J.
Sent: Wednesday, August 17, 2005 11:26 AM
To: Aguirre, Gary J.; Jama, Liban A.; Eichner, Jim
Cc: Hanson, Robert
Subject: RE: Pequot pending matters.

Where are we on determining the date Mack was brought over the wall re GE-Heller deal – the necessary prerequisite to subpoena to Mack?

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 11:21 AM
To: Jama, Liban A.; Eichner, Jim

Cc: Kreitman, Mark J.
Subject: Pequot pending matters.

I summarize below a list of pending matters following up on our conversations over the past couple of days, yesterday with Liban alone. Thee items in bold will be the subject of phone calls this afternoon, if you would like to sit in.

Mark: since Bob is out, I am copying you on the list. I am leaving for vacation tomorrow, which I cleared with Bob.

1) **Confirm exam date for Beaton in NY for week of 9/5; get exam room and reporter;**
2) **Confirm exam dates for Dartley for week of Sept. 19 in DC and Samberg for week of Sept. 26 for NY; get exam room and reporter;**
3) **Pequot subpoena: Press Hamish for compliance with July subpoena (lets discuss);**
4) **Get status from Storch on each class of back up tapes.**
5) **Morgan Staley: Get clarification from Ashley Wall on any soft spots in her letter re MS subpoena compliance; you can tackle this if you want while I'm out or I'll do when I'm back.**
6) Status of FBI contact with Zilkha; we want Samberg exam immediately after Zilkha interview; we're waiting agent's callback. Agent is David Markel, tel # 718-286-7385
7) Telephone company subpoenas: Any useful phone records produced of Samberg calls from mid-June through end of July?
8) CSFB: Get press on Patalino for the following:
    a) July subpoena paragraph 1: Thornberg and Rady's e-mails with Mack; Mack–CS (as parent) e-mails;
    b) July subpoena paragraph 2: Thornberg or Radis notes or memos re Mack; CS notes or memos re Mack
    c) Letter to Patalino on above;
    d) Look for August 30 production of items 3-8.
    e) Remind Patalino next week if we do not have his letter re above.
    f) August 17 subpoena: we need to work out; he will ID info flow; we make sure his doc review gets docs.
9) Andor backup tapes issue: See my memo raising construction issue on Pequot-Andor agreement (will send an e-mail on this today);
10) Other acquisition players have contacts with Pequot before Samberg trades? You can ask them to collect this info by request letter. However, I doubt any will admit w/o docs. GE and JP Morgan say no docs. You have Wall letter. Need to check with Merrill on Hughes.

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 10:15 AM
To: Hanson, Robert
Subject: RE: Ferdinand Pecora

I am coming in to do the memo now. I will take off Monday instead.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

From: Hanson, Robert
Sent: Thursday, August 04, 2005 10:16 AM
To: Aguirre, Gary J.
Subject: RE: Ferdinand Pecora

Gary,

We seem to be miscommunicating and I'm not sure why. We both have the same objectives. I learned through the grapevine, rather than directly, that you were not leaving but staying and wanted to know what your plans are. I still am not sure because we covered different issues last night and never got to the heart of the question. I inquired because I need to figure out how to staff the case and the like. Your status is obviously very important to figuring out what to do and how to staff the case.

I think we should prepare a memo discussing why it is appropriate to take Mack's testimony at this point. I said I would do it at one point and I thought you said you would do it shortly thereafter. We've discussed this several times thereafter and Paul mentioned recently that he was still looking for a memo. We may have different recollections, but at bottom I still believe one should be prepared. I'm happy to do the memo, though it will have to wait now until after my vacation.

I believe that Mark feels it is premature to take Mack's testimony. I don't disagree. I thought and think it makes sense to write a memo to make sure everyone has a chance to understand the facts we have and whether it makes sense to take the testimony at this juncture. Paul had wanted to talk about taking the testimony at one point. I think the memo should precede such discussion. As a general matter I try to alert folk above me about significant delopments in investigations that may trigger calls and the like so that they are not caught flat footed. I also think that Paul and possibly Linda would want to know if and when we are planning to take Mack's testimony so that they can anticipate the response, which may include press calls, that will likely follow. Mack's counsel will have "juice" as I described last night -- meaning that they may reach out to Paul and Linda (and possibly others). Hope this clarifies things somewhat.

Thanks.

Bob

PS I do not believe in micromanagement or feel it is necessary.

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 9:48 AM
To: Hanson, Robert
Subject: RE: Ferdinand Pecora

Bob:

I do not believe you have accurately characterized our discussion last night nor do I have any recollection of you request for an e-mail a month ago.

I came to your office last night to discuss Pequot because, as I told you, I realized we would not be seeing each other for the next month. Before we got into that discussion, you told me that you had heard I was staying with the Commission and asked that I tell you about my plans.

I then told you that the "micromanagement" of my work had nothing to do with the reason I was leaving the Commission. I did not "grumble" about micromanagement. To the contrary, I told you that I was aware when I accepted the staff attorney position that micromanagement came with the job and that I had fully accepted this as part of the way things are done here, and I understand why you and others believe that is necessary.

I then told you there were two reasons that have collectively triggered my decision to leave. I told you that Mark was not listening to the rationales for the steps I had proposed in the Pequot investigation, that this represented a major shift that occurred overnight in our relationship, that we had an excellent relationship before, that I believe other people at the Commission were involved in Mark's sudden shift, and that the shift was ultimately traceable to the fact that I had filed an EEO claim that had not been dismissed after I accepted employment. I also told you some of the reasons I believed this, i.e., what I had been told by reliable sources how my complaint was viewed by higher levels within the Division, e.g., including a statement that "I would get mountains...hills out of my way if I dismissed the case." I told you I had decided to handle this problem in a different way than resigning and have in fact done so.

Second, I told you that the decision not to take Mack's testimony because of his powerful political connections was the event that triggered my decision, when added to the first problem above. We then discussed at some length what standard had to be met to take Mack's testimony. You told me that Mack was "an industry captain," that he had powerful contacts, that Mary Jo White, Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call Linda about the examination. I told you I did not believe we should set a higher standard for a political captain than anyone else.

Turning to the statement that you had requested a memo a month ago, I do not recall any such request. I will be specific about what I do recall. Late in the week of June 20, you told me you were going to prepare memo to Paul Berger regarding Pequot. That followed

a series of e-mails between us that same week. You also mentioned, as you did last night, that Mack's testimony would be difficult because Mack had powerful political connections. For that reason, the political hurdle, I spent a big chunk of my weekend preparing two lengthy memos that described in detail the facts relating to Samberg's trading in HF and GE, which suggested elements of the tipper's profile, and a second memo describing all possible avenues for establishing the identity of the tipper, proposing that Mack was the most likely candidate, and suggesting that we focus on him to eliminate him or establish it was in fact him. Those e-mails were prepared for you and Mark and assumed some knowledge of the investigation. I also thought they might assist you in preparing your memo to Paul. I had no expectation they would be sent to Paul. I also had copies sent to Mark and, at his request, two spreadsheets summarizing e-mails relating to Mack's motivations and list of the funds he had invested in. I do not recall a request by you or anyone else for any other memo. I had hoped that these two memos, with citations and quotes to the evidence, would at least prompt a discussion. You and Mark discussed the memos and then Mark called me with a question that demonstrated that my memos had either been rejected or bypassed. In mid-July, I spoke with Paul about my continuing concern about Pequot. Mark asked that I provide him with a memo of the factors that might have motivated Mack to tip Samberg on HF. Since this subject was addressed in the two memos and two spreadsheets that I delivered to Mark on June 27 and June 28, he obviously wanted something more. I had just begun to take "Official Time" and thought this request was not urgent. About a week later, on July 25, I received an e-mail from Mark that responded to my e-mail of June 28, four weeks earlier. It raised new questions about Mack. I responded in detail to Mark's emails issue by issue last Friday.

I don't know of any request from you or Mark for any memos relating to Pequot over the past six weeks.

Gary

From: Hanson, Robert
Sent: Thursday, August 04, 2005 7:38 AM
To: Aguirre, Gary J.
Subject: RE: Ferdinand Pecora

Gary,

The constant back and forth on these issues consumes a lot of time. I suggested that you write a concise memo on the issue of taking Mack's testimony more than a month ago. That way people can see your proposal, meet on it and comment on it. It's a natural thing that Paul and perhaps Linda would want to know about. At this point, I'm still waiting for the memo (as is Paul I believe), though I understand from talking with you last night that you have given Mark and Paul some materials that I haven't seen. People here are smart, hard working and want to do the right thing. I'm making suggestions to you that you either ignore or don't like and grumble about (the mircomanagement comment last night) -- but my experiences here shows that they work. I hope you give that some consideration.

Gary J. Aguirre

Senior Counsel
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From: Hanson, Robert
Sent: Thursday, August 04, 2005 7:38 AM
To: Aguirre, Gary J.
Subject: RE: Ferdinand Pecora

Gary,

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From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 7:25 AM
To: Hanson, Robert
Subject: Ferdinand Pecora

Bob:

I mentioned last night that Ferdinand Pecora was chief counsel for the Senate Committee that drafted the 1933 and 1934 Acts, including the key operative language of Section 10(b). Those hearings eventually were named after him, the Pecora Hearings. Pecora warned in his opening words in Wall Street under Oath:

"Under the surface of the governmental regulation of the securities market, the same forces that produced the riotous speculative excesses of the 'wild bull market' of 1929 still give evidences of their existence and influence. Though repressed for the present, it cannot be doubted that, given a suitable opportunity, they would spring back into pernicious activity. Frequently we are told that this regulation has been throttling the country's prosperity. Bitterly hostile was Wall Street to the enactment of the regulatory legislation. It now looks forward to the day when it shall, as it hopes, reassume the reigns of its former power. . . ."

When the SEC declines to question "industry captains," when an investigation suggests it is the next logical step, we are granting them a pass to play the trading game by their own rules. We do the same when we set artificially high barriers to question them that do not

exist for others, e.g., don't question them about going over the wall until we proved they have already made the trip.

I don't think Pecora was suggesting that regulatory scrutiny be delayed until we have another market collapse. I do not think he would have delayed a heartbeat before taking John Mack's testimony on the record in this matter. Mack had multiple motives, Samberg's trust, contact with Samberg at the key moment, and two possible sources for the tip. He should be asked the obvious questions.

Gary

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 5:29 PM
To: Hanson, Robert
Subject: RE: Mack testimony

This will have to wait till I get back so I have access to e-mails, documents, etc. Also, I do need some time off.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 4:31 PM
To: Aguirre, Gary J.
Subject: RE: Mack testimony

Gary,

We seem to have different recollections of what I said.

Moreover, I get the sense that you feel there is some hidden motivation for not wanting to take Mack's testimony now that I don't quite understand. I'm not sure what you think this is about (using your words), but, as I've mentioned before, and will mention again, we should try to figure out a number of things about Mack before scheduling him up. You can disagree with that course of action, which is perfectly fine by me, but you need to convince me and others that your course is the more appropriate one. One way to do that, which I suggested, was to write a clear and concise memo laying out all of the facts as to why to take Mack's testimony at this point (I believe that everyone feels we will take Mack's testimony at some point – the question is when). I think you've prepared that memo and I've forwarded it on to Paul and Mark to digest. If there is other information beyond that memo and the other e-mails you sent to me and Mark in June, please let m know.

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 3:53 PM
To: Hanson, Robert
Subject: RE: Mack testimony

See my comments below.

Gary J. Aguirre
Senior Counsel
Division of Enforcement

Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 3:05 PM
To: Aguirre, Gary J.
Subject: RE: Mack testimony

Gary,

I read your "over the wall" e-mail when you sent it by cc to me. I assumed that Mark used that phrase to mean whether Mack had the information, not in the technical sense of the phrase (I doubt the technical sense would have any relevance in this case). I still recommend that we try and figure out whether Mack had the information before approaching him. I would like to be more diplomatic, but that would compromise accuracy. I believe the bar has been set at 9' to take Mack's testimony and done so retroactively. First, Mark wanted proof of motive. When I documented that, Mark wanted proof that Mack went over the wall. That would just about take a confession from the CSFB CEO, who says he is innocent of any wrongdoing, the CS CEO, whose testimony we cannot take, or Mack, whose testimony we cannot take. Since documents are being filtered by Lynch, and may not exit anyway, there can be no miracle leap over 9' bar. I do not think this is about "over the wall."

Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony. As far as I know politics are never involved in determining whether to take someone's testimony. I've not seen it done at this agency. It does make sense though to have all your ducks in a row before approaching a significant witness like Mack. Hence, the reason to try and figure out a number of things about him before scheduling him up, not least of which is whether he knew about the deal. Bob, this is spin. You told me it would be tough to take Mack's testimony because he has political clout. An artificially high barrier has been set for his exam. I do not think this is proper. Doing so clashes with the SEC's mission. It also stops me from doing my job as a federal officer.

Less importantly, perhaps I was wrong but I thought the word assessment came from your e-mail. If not, my bad. As for urgency, I just wanted to understand when Paul asked for the information, since I heard it from him but never from you (not the normal way to keep informed). Also, can I get a copy of the lengthly e-mails or memos you sent Paul in mid-July? I sent one in mid-July; I understood my memo of August 4 to you was for Paul. I am not sure whether Paul wanted it distributed. It's important for me to be kept in the loop on things that have a bearing on th case.

Thanks.

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 3:05 PM
To: Aguirre, Gary J.
Subject: RE: Mack testimony

Gary,

I read your "over the wall" e-mail when you sent it by cc to me. I assumed that Mark used that phrase to mean whether Mack had the information, not in the technical sense of the phrase (I doubt the technical sense would have any relevance in this case). I still recommend that we try and figure out whether Mack had the information before approaching him.

Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony. As far as I know politics are never involved in determining whether to take someone's testimony. I've not seen it done at this agency. It does make sense though to have all your ducks in a row before approaching a significant witness like Mack. Hence, the reason to try and figure out a number of things about him before scheduling him up, not least of which is whether he knew about the deal.

Less importantly, perhaps I was wrong but I thought the word assessment came from your e-mail. If not, my bad. As for urgency, I just wanted to understand when Paul asked for the information, since I heard it from him but never from you (not the normal way to keep informed). Also, can I get a copy of the lengthly e-mails or memos you sent Paul in mid-July? It's important for me to be kept in the loop on things that have a bearing on the case.

Thanks.

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 1:53 PM
To: Hanson, Robert
Subject: RE: Mack testimony

Bob:

I have three comments regarding "the over the wall" requirement. First, before and after the Mack decision, you have told several times that the problem in taking Mack's exam is his political clout, e.g., all the people that Mary Jo White can contact with a phone call. Second, proof that a witness was "over-the-wall" had not been a prerequisite for any other examination in this matter. Third, see my memo to Mark on the same subject below.

You sate, "My suggestion a while ago was to write a memo so that we could vet the issue with Paul." I sent Paul a comprehensive memo in mid-July. When you told me in early August that he was still waiting for a memo, I drafted another memo and sent it to you on August 4.

Finally, you state "On that note, do you remember when Paul asked for the assessment from you? I got the sense from him that it had been a while ago. Is the assessment the third e-mail below?" I have clear recollections of my discussions with Paul, but I do not recall his request for an "assessment," other than a statement of my views why we should proceed with the Mack testimony. As stated above, I have sent two lengthy memorandums on that issue to him.

In my office, in mid-July, I told Paul that I would be sending him a second memo discussing the factors which, in addition to the Mack decision, led to the tender of my resignation. I intend to complete and send that memo to Paul as soon as I return, since I

do not have access now to the documents I need. If there is some urgency that Paul receive it, which I did not understand before, I will endeavor to do it from my recollection of the events and dates, but that will be tough because it will cover approximately seven months.

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 9:05 AM
To: Aguirre, Gary J.
Subject: RE: Mack testimony

Mark's idea makes complete sense to me. Normally we start questioning those who had the insider information.

It's been my experience that Mark views issues very objectively and closely and Paul does also. attempt to as well. I believe Mark has thought long and hard about the best way to proceed on GE/Heller and continues to think about it. You may disagree with his determinations (and mine as well) and that, of course, is your right. My suggestion a while ago was to write a memo so that we could vet the issue with Paul. From your e-mail directly below it seems that Paul had the same idea.

On that note, do you remember when Paul asked for the assessment from you? I got the sense from him that it had been a while ago. Is the assessment the third e-mail below?

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 12:04 AM
To: Hanson, Robert
Subject: RE: Mack testimony

Bob:

While you were on vacation, Mark informed me that I would have to establish that Mack "went over the wall" before I could take Mack's testimony and ask him whether he went over the wall. This makes no sense to me.

Further, Paul had asked me to send him my assessment why it was necessary to take Mack's testimony and I delayed it in hopes that the assessment would be reviewed objectively. Since Mark has already made up his mind, I see no point in further delaying the analysis that Paul requested.

Gary

From: Hanson, Robert
Sent: Thursday, August 04, 2005 10:16 AM
To: Aguirre, Gary J.
Subject: RE: Ferdinand Pecora

Gary,

We seem to be miscommunicating and I'm not sure why. We both have the same objectives. I learned through the grapevine, rather than directly, that you were not leaving but staying and wanted to know what your plans are. I still am not sure because we covered different issues last night and never got to the heart of the question. I inquired because I need to figure out how to staff the case and the like. Your status is obviously very important to figuring out what to do and how to staff the case.

I think we should prepare a memo discussing why it is appropriate to take Mack's testimony at this point. I said I would do it at one point and I thought you said you would do it shortly thereafter. We've discussed this several times thereafter and Paul mentioned recently that he was still looking for a memo. We may have different recollections, but at bottom I still believe one should be prepared. I'm happy to do the memo, though it will have to wait now until after my vacation.

I believe that Mark feels it is premature to take Mack's testimony. I don't disagree. I thought and think it makes sense to write a memo to make sure everyone has a chance to understand the facts we have and whether it makes sense to take the testimony at this juncture. Paul had wanted to talk about taking the testimony at one point. I think the memo should precede such discussion. As a general matter I try to alert folk above me about significant delopments in investigations that may trigger calls and the like so that they are not caught flat footed. I also think that Paul and possibly Linda would want to know if and when we are planning to take Mack's testimony so that they can anticipate the response, which may include press calls, that will likely follow. Mack's counsel will have "juice" as I described last night -- meaning that th y may reach out to Paul and Linda (and possibly others). Hope this clarifies things somewhat.

Thanks,

Bob

PS I do not believe in micromanagement or feel it is necessary.

The total commissions paid by the Registrant for the 12 month period ending June 30, 2002 is as follows:

	Implied**	Listed	Total Commissions
Pequot Endowment Fund, L.P.	$6,819,009.32	$9,017,685.11	$15,836,694.43
Pequot International Fund, Ltd.	$16,805,950.70	$18,723,399.81	$35,529,350.51
Pequot Partners Fund, L.P.	$14,223,282.13	$16,765,058.07	$30,988,340.20
Pequot Select Fund, L.P.	$414,346.30	$258,635.00	$672,981.30
Pequot Healthcare Fund, L.P.	$2,882,535.31	$2,558,652.36	$5,441,187.67
Pequot Healthcare Institutional Fund, L.P.	$1,120,351.98	$964,474.63	$2,084,826.61
Pequot Healthcare Offshore Fund, Inc.	$3,222,905.48	$3,253,803.47	$6,476,708.95
Pequot Navigator Offshore Fund, Inc.	$11,029,324.81	$9,594,367.41	$20,623,692.22
Pequot Telecom and Media Fund, L.P.	$16,667,375.10	$12,946,456.87	$29,613,831.97
Pequot Telecom and Media Institutional Fund, L.P.	$4,413,229.45	$3,418,929.24	$7,832,158.69
Pequot Telecom and Media Offshore Fund, Inc.	$10,527,899.66	$8,089,510.42	$18,617,410.08
Pequot Scout Fund, L.P.	$21,160,525.45	$17,909,938.59	$39,070,464.04
Managed Accounts	$5,779,031.87	$7,449,324.70	$13,228,356.37
TOTAL	$116,865,767.37	$116,950,236.88	$233,816,003.06

**"Implied" commissions are those that the Registrant calculates as a commission equivalent on a principal trade (i.e., NASDAQ securities).

For the 12 month period ending June 30, 2002, the Registrant had relationships with 182 broker-dealers.

The average commission rate paid by the Registrant for the 12 month period ending June 30, 2002 was $0.05 per share.

Gary Aguirre

From: Aguirre, Gary J.
Sent: Monday, June 06, 2005 11:30 AM
To: Hanson, Robert; Eichner, Jim; Miller, Nancy B.; Foster, Hilton
Cc: Kreitman, Mark J.; Ribelin, Eric
Subject: John Mack correction

Mack left Morgan Stanley in March 01 and was working at CFSB by 7/12/01. He continues to be most likely candidate so far for various reasons: deep connections Heller info at MS, access to Heller info at CSFB, multiple relationships with Samberg in 01(close pals, investor in Pequot, discussed deals, phone call just Samberg began Heller trading, possible office at Pequot, and inch of 2001 e-mails).

Gary Aguirre

From: Hanson, Robert
Sent: Monday, June 20, 2005 8:25 PM
T : Aguirre, Gary J.
Subject: Re: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Okay Gary you've given me the bug. I'm starting to think about the case during my non work hours.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Hanson, Robert <HansonR@SEC.GOV>
Sent: Mon Jun 20 13:45:43 2005
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments below.

From: Hanson, Robert
Sent: Monday, June 20, 2005 12:48 PM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Couple more: Mack spoke with Heller? Don't have evidence of this. See 2 below and then 1) below that, if he's taking with Heller doesn't that go a long way to implicating him? Agreed but no evidence. I still don't get 4) below. When was Mack investing in the funds and how much. Don't have any records showing amount of all investments, just the funds he invested in. But here's what we know from e-mails: Mack was an original investor in Pequot (1999) and invested in multiple funds and deals between May and August of 2001, the only time fame I have reviewed carefully. One investment was $5 million. Another was $1 million. I think another was for $5 million. There are references to others where amounts not stated. Also, where was Mack before CSFB? From March through start date with CSFB, Mack between jobs but sometimes used Samberg's office in New York. Mack was with Morgan Stanley until March of 2001. Recent subpoena to MS asked for 1) all Mack (plus assistants') e-mails to PQ before he left in March and 2) all e-mail from MS staff to Mack after he left. Maybe that's where he learned about Heller. True.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 12:36 PM
To: Hanson, Robert
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments answers below

From: Hanson, Robert
Sent: Monday, June 20, 2005 11:16 AM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-thoeory.

Interesting stuff!

Couple questions:

1) Are you suggesting that we take Mack's testimony now before we get the documents or that we ask for more documents from CSFB or both? Both If you want more documents from CSFB, what would they be? I need to draft language but I would want to get his contract (when signed? June?) and all documents that relate to his phase in (assuming it occurred in June), particularly any meetings with investment banking staff or any download he got from Wheatly, the CEO that was forced out. Keep in mind that he had confrontations with bankers when he walked in, including Quattrone.

2) How do we know that Mack spoke with Heller on June 29 (1 below)? Samberg e-mail of 6/30 saying he spoke with Mack the night before.

3) When did Samberg start buying Heller (3 below)? July 2, the Monday after Mack call.

4) On 5 below, was Mack personally investing in Pequot? Yes; he was an original investor. If so, when and how much? Don't know total, but e-mails in May-August refer to $5 million in one fund, plus more $ for Scout. How would he invest in the hottest deals? Directly, but hard to tell much more because e-mails cryptic and in code. He was investing in: "fr sh start," "Baby C," and "distressed guys." Fresh start was some kind of spin-off from Lucent. And the hottest funds? During time frame, he put $5 million in one fund and wanted to put more in Scout (suspect he was did) which was on fire.

5) Do you interpret the e-mail quoted in 5 below to mean the minimum investment of $5 million to be waived for important industry contacts? Not sure. Samberg says more than $10,000,000 Did Mack then invest less than $5 million in partners? E-mail was not about Mack; it was communication to Zilkha that shows Samberg's state of mind on July 2, 2001.

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 10:18 AM
To: Hanson, Robert
Subject: Pequot: Connecting the dots with the CSFB-Mack-Samberg-thoeory.

I think we should serve a second subpoena on CSFB seeking all documents regarding Mack's phas in with CSFB. Our

first subpoena was very narrow, seeking only e-mails to or from Mack and Pequot during June and July 01. A tougher question is whether to take Mack' story now or wait till we get all info from CSFB. I favor doing it now.

As a theory, the CSFB-Mack-Samberg best connects the dots for the path of the GE-HF tip. It has some gaps and uncertainties, but no inherent inconsistencies. If Mack learned from CSFB about Heller around June 29, I think the story would

be compelling. Here ar the dots I see:

1) Samberg's aggressive buying of Heller suggests he received the tip shortly before July 2. Mack spoke with Heller on Friday evening June 29.

2) June 29 is also a logical time for Mack to learn about the CSFB's inventory of investment banking deals, including the Heller acquisition, given Mack's July 12 start date with CSFB. My inference, albeit on sketchy evidence, is that Mack committed to CSFB in early June;

3) Samberg's continued buying suggests that he was continuing to receive confirmation the acquisition would go through. Mack would likely have continued to get updates on GE-Heller and he continued to have contacts with Samberg.

4) With over $400 million in Pequot funds, an MIT graduate, and 16 years running hedge funds, Samberg was too rich, too smart and too experienced to take a tip from anyone he would not deeply trust. Mack met this criterion and had as much to lose and Samberg if they got caught.

5) Mack profited from being allowed to get in closed funds and in special Pequot deals. He was allowed to pour millions into Pequot's hottest deals and hottest funds in May through August 2001 when Pequot was managing over $15 billion in assets and funds were not accepting new money. As Samberg put it on July 2, the day he began trading in Heller, "the only fund open now is partners, and although the min is $5mm, we are always willing t make significant exceptions for important industry contacts."

[Bob: The term "industry contacts" appears more than 2000 times in PQ e-mails]

Incidentally, the above may also help explain Lynch's call to Paul. Incidentally, Lynch advised Mack on at least one Pequot deal. Mack wrote Samberg on 2/6/02 stating, "I have ch cked with Gary Lynch and he confirmed that there is no conflict for me as an original investor [in Pequot]." Mack also hired Lynch: Here's one newspaper account: "Mack hires include Gary Lynch, a former enforcement chief at the Securities and Exchange Commission, who is a vice chairman in charge of stock research and legal compliance, and Stephen Volk, 68, a former managing partner at law firm Shearman & Sterling, who was Mack's first hire and became chairman of CSFB."

Incidentally, Volk resigned from Shearman & Sterling in early June, suggesting that the Mack-CSFB deal was in place by then, which in turn means June 29 is a possibility when Mack learned about GE-Heller.

Gary

From: Aguirre, Gary J.
Sent: Wednesday, June 29, 2005 5:11 PM
To: Kreitman, Mark J.
Subject: Mack and CSFB subpeonas

Mark:

As you know, I have asked to issue a subpoena to CSFB and to take the testimony of John Mack in connection with Samberg's $80 million trades in GE and Heller shortly before the public announcement of the GE's acquisition of Heller. I suggested in my e-mail to you of June 27 in summary fashion why Mack was a logical source of the tip and also suggested in my memo of June 28 that this was the next logical step in this investigation.

The reasons are the following:

1) Mack had access to this information from two sources, since he had recently left Morgan Stanley, which represented GE, and moved to CSFB, which represented Heller;
2) Mack had communications with Samberg on at least two critical times during the Samberg's trading, including a call after the close on the Friday before the Monday when Mack began trading; we have no other leads at this time of people who likely knew of the acquisition that had contact with Samberg shortly before he began trading;
3) I have questioned Samberg about all individuals who were identified in chronologies who had knowledge before July 2, 2001 of the Heller acquisition, and Samberg denies he had contacts with any of them; this suggests that the tipper was not directly involved in the acquisition;
4) Samberg would likely have a relationship of trust with the person from whom he accepted the information, Mack meets that criteria,
5) There were a number of motives for Mack to pass this information along to Samberg:
    a) Mack was admitted directly into Pequot deals, e.g., the night that Mack is suspected of giving Samberg the tip, Samberg arranged for Mack to get a $5 million piece of a Lucent investment subsidiary that was being sold at a fire sale;
    b) Mack got to put at least $7 million (likely much higher) into Pequot funds that were closed; these funds had sensational returns at that time, including $5 million into one of the funds that was allocated 5.4 million in profits from GE-HF;
    c) Samberg was proposing Mack as a director on two boards;
    d) They were very close friends, e.g., Samberg's secretary says "Mack loves you!"; Samberg was in desperate need at that time for some big hits, since his all star protégé was leaving about half of Pequot employees and Samberg was worried that more would leave;
    e) Mack solicited and obtained Samberg's stock tips;

f) Other consideration that does not show up in the Pequot e-mails.

Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation. First, Bob has instructed me to stock with the GE-Heller investigation. The Samberg-Microsoft investigation is on hold until David Anders and the FBI speak with David Zilkha. That matter really depends on whether Zilkha tells the FBI that he tipped Samberg around April 9. If he does, David Anders will likely continue the matter as a criminal investigation. If Zilkha does not admit he tipped Samberg, we would have the same problem.

As I mentioned in my June 28 memo, the second best source of proving the Samberg GE tip is from the backup tapes. I am not permitted to speak with either Pollack or Storch, who are handling this matter and Audrey refers me to them. That effectively closed off this source. The other possibility is to take extensive testimony from Pequot employees in this regard. I have already taken five examinations trying to pin down this issue. Further, taking two weeks of testimony on this issue that may not be productive is not how I interpret Bob's guidelines.

I have proposed that we obtain the documents from CSFB that would show when Mack obtained information about GE-HF. I suspect that Mack learned during an orientation at CSFB. I would be looking for information that Mack knew about GE-Heller as well as information when Mack learned. Evidence that Mack learned near or on Friday June 29, the night of his call to Samberg, would tend to focus the matter more on Mack. Evidence that he did not learn until July 3 or never learned would eliminate him. From the newspaper accounts, I have inferred that there were some arrangements between Morgan Stanley and John Mack in early June. This is consistent with an orientation later in the month during which Mack learned about the GE-HF matter, perhaps 10 days to 2 weeks before the public announcement that he was Morgan Stanley's CEO.

I understand you have denied my request to proceed with the CSFB and Mack subpoenas

Gary

From: Aguirre, Gary J.
Sent: Tuesday, July 19, 2005 9:20 AM
To: Hanson, Robert
Subject: Monthly

Bob:

Monthly below. I do not have access to the J-drive from home, so I will paste this in later.

Gary

This investigation underwent a significant shift of focus over the past month after a second session of testimony from Arthur Samberg, CEO of Pequot Capital Management ("PCM"). During this session, Samberg was unable to offer a credible explanation for his $36 million in short sales of General Electric ("GE") and his $44 million in purchases of Heller Financial ("HF") in advance of the public announcement on July 30, 2001, that GE would acquire HF. He also acknowledged that each rationale he had given for purchasing HF during the first session of his testimony was contained in documents shown to him by his attorneys prior to his testimony. In short, he admitted his attorneys spoon-fed him his earlier rationale before he testified in May. The PCM document production indicates that none of the documents shown to Samberg by his attorneys were in his possession before he traded in HF and GE. Further, Samberg could offer no rationale for his short sales of GE. Nor is there such a rationale in the documents produced by Samberg or PCM.

Given Samberg's testimony, Staff is focusing on the various possibilities for establishing the tip's path from the insider to Samberg. Staff (1) has subpoenaed relevant documents from GE and the investment bankers that consulted with GE and HF before the public announcement, (2) has requested GE to provide a more detailed chronology, (3) sought to obtain what appear to be missing documents for the critical period from PCM, and (4) has surveyed the evidence to find someone who might testify against Samberg in connection with his use of non-public information. Staff has also identified a former PCM employee, David Zilkha, who appears to have personal knowledge of Samberg's proclivity to seek and use non-public material information in connection with his trading. Staff has developed and partially executed strategies to obtain withheld documents from PCM.

Staff's analysis currently suggests that the most likely source of the tip is John Mack, former CEO of Credit Suisse First Boston ("CSFB"), a consultant to HF on the acquisition, and former Co-CEO of Morgan Stanley, a consultant to GE in connection with the acquisition. Staff has subpoenaed documents from both CSFB and Morgan Stanley relating to the possibility that Mack obtained information from either CSFB or Morgan Stanley that he passed along to Samberg.

Staff has provided documents to the U.S. Attorney for the Southern District of New York (AUSA David Anders) and the FBI regarding Samberg's trading in GE and HF and Samberg's use of Zilkha to obtain non-public material information relating to Microsoft in advance of Samberg's trading in Microsoft options. AUSA Anders has advised Staff of his intention to have FBI agents interview Zilkha during the week of July 18.

From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Ribelin, Eric <RibelinE@SEC.GOV>; Foster, Hilton <FosterH@SEC.GOV>; Eichner, Jim <EichnerJ@SEC.GOV>; Conroy, Thomas <CONROYT@SEC.GOV>; Glascoe, Stephen <GlascoeS@SEC.GOV>; Miller, Nancy B. <MillerNB@SEC.GOV>
CC: Hanson, Robert <HansonR@SEC.GOV>; Kreitman, Mark J. <KreitmanM@SEC.GOV>
Sent: Fri Jun 03 08:36:07 2005
Subject: Possible tipper new Pequot Chairman?

John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. Mack moved from Morgan Stanley, adviser in Heller acquisition, to CSFB, also adviser in Heller, in late July 2001, the month of acquisition. The are hundreds of Pequot e-mails referring to Mack, including a dozen in July 2001. See e-mail below between Samberg and his son referring to Mack ("It's nice to have friends in high places...:)" Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets? Please note the happy face which has already come up twice in relating to possible flow of insider info. Ironically, Mack's article quoted below is C-1 of WSJ, just as was when Samberg's exchanged e-mails below.

John Mack to Join
Pequot Hedge Fund
In Chairman's Role

By GREGORY ZUCKERMAN and ANN DAVIS
Staff Reporters of THE WALL STREET JOURNAL June 3, 2005

In the latest example of a prominent financial figure entering the hedge-fund world, former Wall Street heavy-hitter John Mack is joining Pequot Capital Management Inc. as chairman.

Mr. Mack, 60 years old, was co-chief executive of Credit Suisse Group and CEO of that bank's Credit Suisse First Boston until last year, and previously was president of Wall Street firm Morgan Stanley. He will work with Pequot's founder, Art Samberg, to help lead the firm into new markets, recruit money managers and help guide the Westport, Conn., firm. Hedge funds are lightly regulated investing pools, traditionally for the wealthy and institutions.

[John Mack]Mr. Samberg, 64, an investor with a well-regarded record, will remain chief executive of Pequot, which manages about $6.5 billion, effectively running the firm day-to-day. (Meanwhile, a British financial regulator, Gay Huey Evans, is joining a hedge fund run by Citigroup.)

Speculation about where Mr. Mack would land after he was replaced last year at CSFB has been something of a parlor game on Wall Street. Various companies put out feelers, including Goldman Sachs Group Inc., and he was approached as a possible candidate to run mortgage giant Fannie Mae, among other positions, according to people close to the

matter. Some expected Mr. Mack, who is active in politics, to seek an office or ambassadorship.

But like many Wall Street traders and analysts lately, Mr. Mack is heading for the hedge-fund world, where assets are growing and the rewards can be lucrative. Hedge funds generally charge a management fee and a percentage of the firm's investment gains, meaning that stellar results bring big paydays. In addition to a salary, Mr. Mack will receive equity in Pequot, according to the firm.

Mr. Mack wouldn't address details of other possible job offers but said in an interview that he was attracted to Pequot because he and Mr. Samberg have been friends for more than a decade, starting when Mr. Mack gave some money to Mr. Samberg to invest. Mr. Mack also said he was eager to help the firm push into new investment areas.

[Arthur Samberg]"Many people who have called me for a job want me to fix something, but I'd like to focus my job on building," Mr. Mack said.

For Pequot, the hiring of Mr. Mack is part of a change in recent years from traditional hedge-fund strategies, such as buying and selling U.S. and European shares. Returns for some hedge-funds have fallen, amid concern by some that too many savvy hedge funds were seeking the same opportunities in the market.

Hedge funds lost less than 1% this year through April -- results that topped the returns of the market though they pale in comparison to the double-digit gains hedge funds scored in recent years. Pequot's various hedge funds are up about 3% in 2005, according to investors. But Mr. Samberg predicts that the growth of the hedge-fund business will lead to a shakeout that forces as many as 30% of existing hedge funds to throw in the towel, even as institutions continue to up their investments in so-called alternative investments. At the same time, the market is neither cheap nor especially expensive, presenting few obvious opportunities. That is why Pequot has been looking elsewhere lately, starting hedge funds focused on emerging markets, parts of the debt world and other strategies.

As reported in The Wall Street Journal, Pequot recently formed a joint venture with Singapore-based Pangaea Capital Management to invest in distressed assets in Asia, including real estate.

Mr. Mack's move effectively blunts speculation that he might join a new investment-banking boutique with some recently departed top Morgan Stanley executives. A group of former Morgan alumni waged a loud campaign for the ouster of Morgan CEO Philip Purcell this spring, after a management shakeup and several executive departures. Mr. Mack, who clashed with Mr. Purcell before he left the firm in 2001, has kept a studied distance from the dissidents.

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clashed with Mr. Purcell before h left the firm in 2001, has kept a studied distance from the dissidents.

Mr. Mack will be asked to tap into his wide-ranging contacts to find new investment ideas around the globe, as well as coach Pequot's investment team. Mr. Mack is expected to help smooth the way for Pequot fund managers by introducing them to company executives.

"I see an opportunity to build something really great here and John will be a big part of that," Mr. Samberg said.

Mr. Samberg's previous alliance with a high-powered partner ended when Pequot co-founder Dan Benton quit the firm in 2001, taking about $7 billion of investor money with him to his new firm, Andor Capital Management LLC. Mr. Samberg says he is confident his new partnership with Mr. Mack will work, in part because of his close relationship with Mr. Mack. In recent months, Mr. Mack has been using spare space in Pequot's New York office, weighing his options.

The move to bring in an established Wall Street executive like Mr. Mack could signal that Pequot, like some other hedge-fund firms lately, might be interested at some point in selling itself, or part of the firm, to a mainstream Wall Street firm or even going public through a stock offering, although Mr. Samberg says he has no plans to do so. J.P. Morgan Chase & Co. recently purchased a majority stake in big hedge-fund firm New York-based Highbridge Capital Management., and Lehman Brothers Holdings Inc. has purchased 20% of Ospraie Management LP, a New York hedge fund.

Merrill Lynch & Co. agreed to provide $300 million in capital for a venture with Pequot to place money with 15 to 30 new fund managers. Pequot is expected to offer the managers research and administrative support -- part of a trend of hedge funds providing services also offered by investment banks., blurring the lines between the two.

TO : 'joe@jdscm.com'[joe@jdscm.com]
FROM : Samberg, Art[/O=DSCM/OU=SOUTHPORT/CN=RECIPIENTS/CN=ART]

SUBJECT : Re: John Mack
DATE = 07/12/2001
OCRTEXT :
Spoke to him last night and commented on how up he sounded. He said he was close to somethbing, but I didn't know it would be today. Sounds like the perfect opportunity for him.

-----Original Message-----
From: Joe Samberg <joe@jdscm.com>
To: 'jmault@healthetech.com' <jmault@healthetech.com>
CC: 'art@pequotcap.com' <art@pequotcap.com>
Sent: Thu Jul 12 13:00:59 2001
Subject: John Mack

If you read the front page of the C Section of the WSJ, you will see that our friend and latest investor, John Mack, is to become the new CEO of CFSB, the no.2 underwriter in the U.S.! It's nice to have friends in high places...:)

Joseph D. Samberg
President, JDS Capital Management, Inc.
780 Third Ave.
New York, N.Y. 10017

tel: 212-833-9920
fax: 212-593-8814

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-942-9519
mailto: aguirreg@sec.gov

Gary Aguirre

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:35 AM
T : Thomsen, Linda
Subject: Hilton's comment to you

Do you have an open door policy?

If so, do you recall Hilton Foster's comment to you about the most important case he handled in his 30 years with the Commission? He wanted me to talk to you about it. It was nearly killed 5 months ago and is now moving in circles.

It could change the financial markets--make them a little more hospital for investors, small or big, who do their home work rather than buy information with favors.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

Gary Aguirre

Subject: FW: Hilton's comment to you

From: Aguirre, Gary J.
Sent: Wednesday, August 10, 2005 11:10 AM
To: Thomsen, Linda
Subject: RE: Hilton's comment to you

Linda:

The day following my e-mail to you, my Branch Chief said he would like to discuss in September, when all are back from vacation, the specific concern that prompted my e-mail to you. I therefore believe it makes more sense to delay discussing this matter with you until September to see if it works itself out.

Thanks for you reply.

Gary

From: Thomsen, Linda
Sent: Thursday, August 04, 2005 1:32 PM
To: Aguirre, Gary J.
Subject: RE: Hilton's comment to you

I would be happy to meet with the team working on the matter.

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:40 AM
To: Thomsen, Linda
Subject: Hilton's comment to you

Do you have an open door policy?

If so, do you recall Hilton Foster's comment to you about the most important case he handled in his 30 years with the Commission? He wanted me to talk to you about it. It was nearly killed 5 months ago and is now moving in circles.

It could change the financial markets--make them a little more hospital for investors, small or big, who do their home work rather than buy information with favors.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

Aguirre, Gary J.

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 12:38 PM
To: Kreitman, Mark J.
Cc: Hanson, Robert
Subject: RE: Pequot pending matters.

As I understand the term "over the wall," I do not think it applies here in its usual sense: someone within a securities firm going over the "wall" restricting access to non-public, material information. The tip to Samberg, assuming it took place, must have occurred before Mack started with CSFB. There will be no evidence in the classic sense that he went over the wall, as there was no wall at that time.

The question is whether GE-Heller acquisition was disclosed to Mack during the wooing period with CSFB. This will not be easy for two reasons. First, 90% was handled by Credit Suisse in Geneva which, as a Credit Suisse, is beyond the reach of our subpoena I have been working through CSFB to try to get them to produce CS's documents, and they sound cooperative. Second, all subpoena documents are passing through Lynch, who is going back to Morgan Stanley to join Mack. I am hearing a lot about privacy rights under Swiss law.

Patalino (CSFB contact) says Mack had two limited contacts with CSFB shortly before he started work He met with CSFB's CFO and an attorney two weeks before he started (around June 29) and again just before he started. Both dates are very significant in terms of Samberg's trading: June 29 is when Mack spoke by phone with Samberg, which is just before Samberg began trading in Heller. July 8-9 is the time frame when Samberg increased his buy on Heller from 15,000 to 400,000 shares, suggesting that his information was refreshed. This also correlates with the date that GE increased its offer for Heller.

Bottom line: evidence suggests that Samberg had his info refreshed on exact days that Mack met with CFO of CSFB. Item 8 is an effort to obtain information relevant to the possibility that info went to Mack during meetings with CSFB and CS. I am not optimistic, given the Lynch filter.

From: Kreitman, Mark J.
Sent: Wednesday, August 17, 2005 11:26 AM
To: Aguirre, Gary J.; Jaime, Liban A.; Eichner, Jim
Cc: Hanson, Robert
Subject: RE: Pequot pending matters.

Where are we on determining the date Mack was brought over the wall re GE-Heller deal – th necessary prerequisite to subpoena to Mack?

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 11:21 AM
To: Jaime, Liban A.; Eichner, Jim

Cc: Kreitman, Mark J.
Subject: Pequot pennding matters.

I summarize below a list of pending matters following up on our conversations over the past couple of days, yesterday with Libas alone. Thee items in bold will be the subject of phone calls this afternoon, if you would like to sit in.

Mark: since Bob is out, I am copying you on the list. I am leaving for vacation tomorrow, which I cleared with Bob.

1) **Confirm exam date for Benton in NY for week of 9/5; get exam room and reporter;**
2) **Confirm exam dates for Dartley for week of Sept. 19 in DC and Samberg for week of Sept. 26 for NY; get exam room and reporter;**
3) **Pequot subpoena: Press Harnish for compliance with July subpoena (lets discuss);**
4) **Get status from Storch on each class of back up tapes.**
5) **Morgan Stnley: Get clarification from Ashley Wall on any soft spots in her letter re MS subpoena compliance; you can tackle this if you want while I'm out or I'll do when I'm back.**
6) Status of FBI contact with Zilkha; we want Samberg exam immediately after Zilkha interview; we're waiting agent's callback. Agent is David Markel, tel # 718-286-7385
7) Telephone company subpoenas: Any useful phone records produced of Samberg calls from mid-June through end of July?
8) CSFB: Get press on Patalino for the following:
   a) July subpoena paragraph 1: Thornberg and Rady's e-mails with Mack; Mack--CS (as parent) e-mails;
   b) July subpoena paragraph 2: Thornberg or Radis notes or memos re Mack; CS notes or memos re Mack
   c) Letter to Patalino on above;
   d) Look for August 30 production of items 3-8.
   e) Remind Patalino next week if we do not have his letter re above.
   f) August 17 subpoena: we need to work out; he will ID info flow; we make sure his doc review gets docs.
9) Andor backup tapes issue: See my memo raising construction issue on Pequot-Andor agreement (will send an e-mail on this today);
10) Other acquisition players have contacts with Pequot before Samberg trades? You can ask them to collect this info by request letter. However, I doubt any will admit w/o docs. GE and JP Morgan say no docs. You have Wall letter. Need to check with Merrill on Hughes.

U.S. SECURITIES AND EXCHANGE COMMISSION

"We are the investor's advocate."
William O. Douglas
SEC Chairman, 1937-1939

DIVISION OF ENFORCEMENT

FACSIMILE TRANSMISSION

Date: 09/02/2005 **Time:**

TO: Chairman Christopher Cox

Telephone Number: (202) 551-2100 Facsimile Number: (202) 772-9200

FROM: Gary J. Aguirre

Telephone Number: (202) 551-4437 Facsimile Number:

TOTAL NUMBER OF PAGES: 3

REMARKS:

If you did not receive a complete fax, please call the above number.
The main fax number for the Division of Enforcement is 202-942-9637.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F ST., N.E.
WASHINGTON, D.C. 20549

WRITER'S DIRECT DIAL LINE
(202) 551-4437

September 2, 2005

Via Facsimile to 202-772-9280 and Regular Mail

Chairman Christopher Cox
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20037

Re: In the Matter of Trading in Certain Securities; HO-9818

Dear Chairman Cox:

I am compelled to write to you today, my last day with the Commission, out of a sense of duty to the Commission's mission—to maintain the integrity of the financial markets and to protect the investor. Unfortunately, my supervisors—as far up the chain as I can see—have lost sight of that mission in the above matter. I state the facts briefly below, though there is much more to be said.

I have been the staff attorney in the above matter from mid-September 2004 through today. It is an investigation of suspected insider trading by one of the largest hedge funds in the nation, Pequot Capital Management ("PCM"), arising out of eighteen SRO referrals. Staff who worked on this matter from the beginning—Hilton Foster, Eric Ribelin, Thomas Conroy, and I—believe that PCM engages in an institutionalized form of insider trading that corrupts the financial markets and creates an un-level playing filed for honest investors.

As the investigation progressed, one matter dwarfed all others, suspected insider trading by PCM's CEO, Arthur Samberg, during July 2001, just before the General Electric Company ("GE") acquired Heller Financial, Inc. ("Heller"). Mr. Samberg bought $44 million in Heller stock and shorted $36 million in GE stock shortly before the public announcement of the acquisition on July 30, 2001, making an $18 million profit. On the two occasions I took Mr. Samberg's testimony, he could offer no credible explanation for these trades. Everyone involved in this investigation has informed me of their belief Mr. Samberg obtained material non-public information prior to these trades. The only question is: from whom?

Only one person meets the tipper's profile: John Mack, the current CEO of Morgan Stanley. I began informing my supervisors of this evidence in early June. Later in the month, I suggested that Mr. Mack's testimony be taken. On approximately June 23, my Branch Chief, Robert Hanson, told me that it would be very difficult to obtain approval to take Mr. Mack's testimony because of his powerful political connections. Mr. Hanson later repeated the same

statements to me on several other occasions. Some are confirmed by e-mails. Assistant Director Kreitman participated in one of these discussions.

Other events also suggest the decision to take Mr. Mack's testimony has not been handled in the normal course. For example, I have issued approximately 100 subpoenas in this matter and all responsive documents came directly to me. When I served a subpoena on Morgan Stanley seeking documents relating to contacts between Messrs Mack and Samberg, its counsel did not initially send them to me. Rather, she first sent them to Linda Thomsen. Likewise, Morgan Stanley's counsel, Mary Jo White, bypassed the normal protocol of dealing with the staff attorney. Instead, she dealt directly with Ms. Thomsen by correspondence and phone. Of hundreds of contacts with defense counsel, this is the first time any defense counsel began discussions at the top of the chain of command. Further, at the same time, my supervisors excluded me from the discussions involving Mr. Mack.

To avoid any misunderstanding, from late June through late August, I sent multiple e-mails to my Branch Chief Robert Hanson, Assistant Director Mark Kreitman, and Associate Director Paul Berger, as well as a brief e-mail to Linda Thomsen, expressing my concerns. I had no success in obtaining their approval to take Mr. Mack's testimony. Instead, they fired me. Immediately prior to the Mack controversy arising, my Branch Chief and Assistant Director congratulated me for the excellent job I was doing in this investigation. Indeed, Mr. Kreitman gave what he called his highest "Perry Mason award" in mid-June.

I bring these facts to your attention in hopes that you will take whatever steps are appropriate to put this investigation back on track, consistent with the Commission's mission.

I must add that other improper motives also led to my termination, but there is no productive reason to discuss them here.

Sincerely,

Gary J. Aguirre
Senior Counsel

CC: Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth
(By fax and Regular Mail)

7401
Office of Personnel Management

NOTIFICATION OF PERSONNEL ACTION

1. Name, First, Middle	2. Social Security Number	3. Date of Birth	4. Effective Date
[redacted] GARY J	[redacted]	[redacted]	08/21/05

5A. Code	5B. Nature of Action	5C. Code	5D. Legal Authority
194	PAY ADJ		
5E. Code	5F. Legal Authority	5G. Code	5H. Legal Authority
3A8	P.L. 107-123		

6. FROM: Position Title and Number	7. TO: Position Title and Number
GENERAL ATTORNEY (SI)	GENERAL ATTORNEY (SI)
40423000 0EN0718	40423000 0EN0718

8. Pay Plan	9. Occ. Code	10. Grade/Level	11. Step/Rate	12. Total Salary	13. Pay Basis	14. Pay Plan	15. Occ. Code	16. Grade/Level	17. Step/Rate	18. Total Salary/Award	19. Pay Basis
SK	0905	14	24	$130257	PA	SK	0905	14	26	$134110	PA

20. Basic Pay	20A. Locality Adj.	20B. Adj. Basic Pay	20C. Other Pay	20A. Basic Pay	20B. Locality Adj.	20C. Adj. Basic Pay	20D. Other Pay
$112310	$ 17947	$130257	$ 0	$115632	$ 18478	$134110	$ 0

21. Name and Location of Position's Organization	22. Name and Location of Position's Organization
DIVISION OF ENFORCEMENT OFFICE OF ASSOCIATE DIRECTOR OFFICE OF ASSISTANT DIRECTOR #10 BRANCH OF ENFORCEMENT #33 WASHINGTON, DC	DIVISION OF ENFORCEMENT OFFICE OF ASSOCIATE DIRECTOR OFFICE OF ASSISTANT DIRECTOR #10 BRANCH OF ENFORCEMENT #33 WASHINGTON, DC

23. Veterans Preference	24. Tenure	25. Agency Use	26. Veterans Preference for RIF
1: None 2: 5-Point 3: 10-Point/Disability 4: 10-Point/Other 5: 10-Point/Compensable/30%	2 1: None 2: Permanent 3: Conditional		YES [X] NO

27. FEGLI	28. Annuitant Indicator	29. Pay Rate Determinant
BASIC + STANDARD OPTION	9 NOT APPLICABLE	0
00		

30. Retirement Plan	31. Service Comp. Date (Leave)	32. Work Schedule	33. Part-Time Hours Per Biweekly Pay Period
C FERS & FICA	05/03/03	F FULL-TIME	

34. Position Occupied	35. FLSA Category	36. Appropriation Code	37. Bargaining Unit Status
1: Competitive Service 2: Excepted Service 3: SES General 4: SES Career Reserved	E 1: Exempt 2: Nonexempt		7777

38. Duty Station Code	39. Duty Station (City - County - State or Overseas Location)
DC1-0010-001	WASHINGTON, DISTRICT OF COLUMBIA

40. Agency Use	41. VET-STAT	42. EDUC LVL	43. SUPV LVL	44. POSITION SENSITIVITY
ZLS 00	X	15	8	NONSENSITIVE/LOW RI

45. Remarks
MERIT INCREASE BASED ON 2004-2005 PERFORMANCE EVALUATION PERIOD

46. Employing Department or Agency	47. Agency Code	48. Personnel Office ID	49. Approval Date
SEC - SECURITIES AND EXCHANGE	SE00	1057	08/21/05

50. Signature/Authorized Official
JEFFREY [redacted]
ASSOCIATE EXECUTIVE DIRECTOR
051[redacted]881Director - OHR

1 - Employee Copy - Keep for Future Reference

U. S. S curiti s and Exchang Commission
P rformance Plan and Evaluation

Employee Information	Performance Evaluation Period
Name Aguirre, Gary J.	From: Month 10, Year 2004 — To: Month 04, Year 2005
Title General Attorney(s)	**Period Covered by this Evaluation**
Division/Office/Field Office Enforcement	☐ Entire Performance Evaluation Period
Pay Plan, Series, Grade, Step SK-0905-14-24	☐ Detail (From:_____To:_____) ☐ Other (specify)_____

Certification of Performance Appraisal Process

Performance Planning (To be held within 30 days of the beginning of the performance evaluation period)

Employee Signature	Date 11/1/01
Supervisor/Rating Official Signature	Date

Progress Review (To be held within 45 days of the midpoint of the performance evaluation period)

Employee Signature	Date
Supervisor/Rating Official Signature	Date 11/1/04

Evaluation (To be completed within 90 days after the end of the performance evaluation period)

Employee Signature	Date 6/1/05
Supervisor/Rating Official Signature	Date 6/1/05

Performance Rating

☒ Acceptable	☐ Unacceptable

SEC 2494 (5/03)

Performance Assessment
"X" the most appropriate level for each element.

Critical Elements and Acceptable Standards	Results	
	Acceptable	Unacceptable
Knowledge of Field or Occupation - Maintains and, with few exceptions, demonstrates technical skills essential to performing duties of the position, including knowledge of pertinent laws, standards, regulations, rules, policies, procedures, and technologies.	☒	☐
Planning and Organizing Work - With few exceptions, recognizes and solves problems, meets objectives, and considers priorities when planning work assignments. Efficiently uses time and resources to produce a quality product with appropriate guidance and completes assignments within agreed upon time frames.	☒	☐
Execution of Duties - With few exceptions, thoroughly and carefully analyzes and researches assignments. Effectively applies necessary knowledge and technical skills in order to perform duties of the position in an acceptable manner. Final work products meet established need, reflect appropriate attention to detail, and are well organized.	☒	☐
Communications - Oral and written communications further agency objectives and, with few exceptions, are clear, concise, well organized, accurate, grammatically correct, and appropriate for the intended audience. Required personal interactions with internal and external constituencies/ counterparts are generally responsive to the needs of these individuals or entities. Keeps these entities and management apprised of relevant issues, changes, and problems as directed.	☒	☐

SEC 2494 (5/03)

Gary Aguirre

From: Aguirre, Gary J.
Sent: Friday, June 17, 2005 1:36 PM
To: Hanson, Robert
Attachments: Contribution of Gary Aguirre.doc

Finally

Contributions of Gary Aguirre to Staff Investigations and Litigation

In the Matter of Trading Certain Securities **(HO 9818)**

I was assigned this matter on September 9, 2004, two days after I started with the Commission. It was then titled "Trading in the Securities of Elite Information Group, Inc and focused on trading by Pequot Capital Management ("PCM") in Elite's common stock shortly before its acquisition in 2003. My contributions are best summarized by describing separately the steps I took before and after the Commission issued its formal order on January 6, 2005.

Pre-formal order During the period from September 9, 2004, through January 6, 2005, when the Commission issued its formal order, I took the following steps to advance the investigation:

1) Obtained and reviewed files from OCIE relating to its 2003 examination of Pequot Capital Management ("PCM") and documents generated during the Commissions 2002 hedge fund study relating to PCM;
2) Obtained and studied the PCM trade blotter for the period of August 1, 2002, through July 31, 2003;
3) Obtained copies of thirteen SRO referrals relating to PCM's timely trading in advance of public announcements;
4) Interviewed SRO staff members regarding their referrals of PCM trading matters to the Division of Enforcement, including meetings and numerous discussions with staff of the New York Stock Exchange regarding trading by PCM specifically and hedge funds generally;
5) Obtained chronologies and other information from 1) the issuers whose securities had been timely traded by PCM and 2) other key parties;
6) Obtained and studied documents produced by PCM pursuant to a our request for information, including PCM's trade blotter covering trading activity from January 1, 2001, through November 30, 2004;
7) Studied the documents obtained from Lexis-Nexis and other sources regarding the history of PCM and its principals;
8) Discussed the matter on several occasions with the David Esseks of the Office of the United States Attorney for the Southern District of New York;
9) Developed the factual and legal theory for including possible violations of Section 204A of the Investment Advisers Act of 1940 in the formal order memorandum;
10) Drafted a formal order memorandum and proposed formal order that was submitted to the Commission on December 17, 2004;

Post formal order Since the issuance of the formal order, I have served subpoenas on forty four entities or individuals, including 18 individuals affiliated with PCM. As a consequence, staff now has a database of approximately 3.8 million e-mails and other documents relating to PCM trading. I have also taken testimony from the

following individuals:

1) The CEO and CFO of Blue Coat Systems, Inc ("Blue Coat");
2) PCM's CEO in two sessions;
3) PCM's Chief Technology Officer;
4) PCM's Compliance Officer;
5) One of PCM's portfolio managers;
6) Three employees of On Site E-Discovery regarding PCM's e-mail production.

My contributions to this investigation include the following results:

1) The production of approximately 3.8 million documents relevant to this investigation;
2) Evidence of possible insider trading that produced $18.5 million in profits by PCM's CEO in connection with the acquisition of by General Electric of Heller Financial;
3) Interest by the United States Attorney of the Southern District of New York in possible criminal violations by PCM's CEO in connection with two separate insider trading matters;
4) Evidence of insider trading by another PCM portfolio manager, Stephen Orlov, in the securities of Blue Coat.

Additionally, under the guidance of my branch chief, I am handling the day to day matters that arise in this case, including all contacts by phone or letter with approximately fifty attorneys whose law firms or general counsel offices represent the parties affected by this investigation.

Fannie Mae Investigation (HO 9729) My work on this matter related to the FAS 91 issues, in particular how Fannie Mae used "catch ups" as a means of smoothing its earnings flow. After obtaining guidance from Peter Rosario regarding FAS 91, and studying its principles, I conducted searches on Iconect and eventually found the Fannie Mae forms containing the formula that Fannie used each quarter in smoothing its earnings. I prepared an Excel worksheet summarizing my work as well as a memo ("Counting the cookies in the FAS 91 jar?") that was circulated among staff when I was transferred to Mark Kreitman's section.

SEC v. Lucent Technologies Inc. My involvement was limited to assisting Trial Counsel in the preparation of a memorandum of points and authorities in response to a Rule 12(b)(6) motion.

General Electric ("GE")-Instrumentarium FCPA Internal Investigation I was the staff attorney on this matter from September 24, 2004, through January 18, 2005, when I was transferred to Mark Kreitman's section. I evaluated and critiqued the internal investigation conducted by O'Melveny & Meyers of possible violations of the FCPA by GE and one of its subsidiaries in connection with medical equipment that was provided by the GE subsidiary to the Government of Costa Rica.

Gary Aguirre

I supervised Gary Aguirre from January 18 2005 through the end of the rating period. As shown on his contribution statement, Gary worked extremely hard on one investigation during his time in the group, a significant matter involving the trading by Pequot Capital, one of the nation's largest hedge funds.

Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has consistently gone the extra mile, and then some.

Gary can work on presenting information in a clearer and more concise manner to enhance the effectiveness of his communications both to those he reports to and those he works with.

Written by Robert Hanson

Gary Aguirre

Subject: FW: From Staiger, Oct 11, 05

From: GJAguirre@cs.com [mailto:GJAguirre@cs.com]
Sent: Monday, November 07, 2005 10:19 AM
To: GJAguirre@cs.com
Subject: From Staiger, Oct 11, 05

Subj: RE: Merit Pay Increase Documents
Date: 10/11/2005 4:28:27 PM Eastern Daylight Time
From: StaigerC@SEC.GOV
T : GJAguirre@cs.com
Received from Internet: click here for more information

Gary:
There was a supervisory transmittal form from the supervisor to the Compensation Committee along with the Hanson document. It is Commission policy not to release that form.
You now have all documents.

I don't know. You would need check with Mark Kreitman.

Chuck

From: GJAguirre@cs.com [mailto:GJAguirre@cs.com]
Sent: Monday, October 10, 2005 1:11 PM
To: Staiger, Charles
Subject: Merit Pay Increase Documents

Mr. Staiger:

The document signed by Robert Hanson that went to the Compensation Committee was undated. Was it part of another document that had a heading, containing a date as well as the identity of the recipient? If so, could I obtain a complete copy of the document, including the heading showing the date and the identity of the recipient (s)?

Further, do I understand correctly that you have now provided me with all documents that were contained in my Employee Personnel File (EPF)?

I am puzzled by the late inclusion of Mr. Kreitman's e-mail in my file. Was there any explanation how he and Mr. Hanson overlooked its inclusion in the materials submitted to the Compensation Committee?

Sincerely,

Gary J. Aguirre

Gary Aguirre

From: Chairman Christopher Cox
Sent: Thursday, August 18, 2005 11:07 AM
Subject: 2005 Merit Increases

The performance cycle for 2005 has closed and I have completed my review and approval of the merit step increase proposals. The Commission is a knowledge-based agency and the tremendous value that we deliver to the investing public is the direct result of your performance. I want to congratulate each of you on your success, and thank you for the value you have given to our customers – the investors.

I look forward to the work before us and I know that with your track record of successful performance we will continue to execute our mission in an outstanding fashion.

Over the next day or so, your manager will be sharing with you the specific merit step increase that you will be receiving.

Thank you again for your hard work this past year.

Sincerely,

Chris

From: Hanson, Robert
Sent: Friday, June 03, 2005 10:00 AM
To: Aguirre, Gary J.
Subject: Re: Possible tipper new Pequot Chairman?

Mack is another bad guy (in my view)

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Ribelin, Eric <RibelinE@SEC.GOV>; Foster, Hilton <FosterH@SEC.GOV>; Eichner, Jim <EichnerJ@SEC.GOV>; Conroy, Thomas <CONROYT@SEC.GOV>; Glascoe, Stephen <GlascoeS@SEC.GOV>; Miller, Nancy B. <MillerNB@SEC.GOV>
CC: Hanson, Robert <HansonR@SEC.GOV>; Kreitman, Mark J. <KreitmanM@SEC.GOV>
Sent: Fri Jun 03 08:36:07 2005
Subject: Possible tipper new Pequot Chairman?

John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. Mack moved from Morgan Stanley, adviser in Heller acquisition, to CSFB, also adviser in Heller, in late July 2001, the month of acquisition. The are hundreds of Pequot e-mails referring to Mack, including a dozen in July 2001. See e-mail below between Samberg and his son referring to Mack ("It's nice to have friends in high places....)" Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets? Please note the happy face which has already come up twice in relating to possible flow of insider info. Ironically, Mack's article quoted below is C-1 of WSJ, just as was when Samberg's exchanged e-mails below.

John Mack to Join
Pequot Hedge Fund
In Chairman's Role

By GREGORY ZUCKERMAN and ANN DAVIS

From: Aguirre, Gary J.
Sent: Friday, February 18, 2005 11:21 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.
Subject:

I have attached exam schedule. In some cases, I have set the exams of Pequot officers and employees to immediately follow the exams of the issuers or Broadview exams to minimize the time for them to get their stories worked out. Pequot exams are color coded in grey. Other colors are for each party.

These are the first set of exams to be scheduled. When these dates are firm, hopefully today, a second set of subpoenas are ready to go that Hilton will send out.

Witness	Testimony Date	Time	Doc Production
[redacted]	Monday, March 14	10:00 AM	Friday, March 4
[redacted]			
[redacted]	Monday, March 21	10:00 AM	[redacted]
[redacted]			
Mike Kelly	Tuesday, March 29	10:00 AM	
Kaitan Agrawal	Wednesday, March 30	10:00 AM	
Paul Joachim	Thursday, March 31	10:00 AM	
[redacted]			
[redacted]			
[redacted]			

Broadview
Peter Kuo BV
Theresa McCoy

From: Hanson, Robert
Sent: Friday, August 05, 2005 11:17 AM
T : Aguirre, Gary J.
Subject: RE: Mack testimony

Gary,

I forwared this to Paul and Mark to review. I think we should meet after some of the facts in the memo are nailed down to discuss whether it makes sense to go forward. See you in a couple of weeks.

Bob

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:34 PM
To: Hanson, Robert
Subject: Mack testimony

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Peqsot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information

The first element is whether Mack had possible access to information that GE would make a tender offer for HF. He had access from two sources: he had been the CEO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time. Also, CSFB was "wooing" Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or CS to mention, as part of this wooing process, what inventory Mack would be taking over. Incidentally, we know how Samberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the

possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HF during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team as Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller.

a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million info Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "busting his chops" Samberg's chops because he had not got the documents on this investment. Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million

lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) *Board seats* As shown on one of the spreadsheets, Samberg was promoting Mack for board seats on both Baby C and Fresh-start.

c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.

d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."

e) *Friendship* Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo.

f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Samberg had a relationship of trust deep friendship with Mack.

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend.

In July 2001, Samberg's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was

looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and ***I did things in a manner that was expedient at the time given my expertise in this area.***

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. ***Times were fragile.*** I needed their approval to do whatever I wanted to do ***or they might walk*** (emphasis added).

There do not appear to be other leads in the Samberg e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Samberg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Samberg's circles.

Gary

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*rom: Samberg, Art
at: Wednesday, September 26, 2001 10:52 AM
: 'JDiMenna@Zweig-DiMenna.com'
ubject: RE:

anti no investing. don't know ryanair; don't know most of the things i'm buying. :-)

-----Original Message-----
From: JDiMenna@Zweig-DiMenna.com [mailto:JDiMenna@Zweig-DiMenna.com]
Sent: Wednesday, September 26, 2001 7:15 AM
To: art@pequotcap.com
Subject:

i bought some cal/ryany/luv ....thinking people will fly again.

tech...i have no clue.

From: Grime, Richard
Sent: Friday, September 17, 2004 11:04 AM
To: Aguirre, Gary J.
Subject: RE: Input requested

I would suggest that you talk this over with Charles and then let's get together some time next week. Typically I would not go back much further than 3-4 years for transactions given the 5 years SOL for penalties..

From: Aguirre, Gary J.
Sent: Friday, September 17, 2004 10:53 AM
To: Grime, Richard
Subject: Input requested

Richard:

1) I have IDed about 15 questionable PQ transactions going back to 1995. So it will be reasonably current, it will be cut down to about 10. These are all transactions that were spotted by SROs. I am reviewing PQs form 4s (16(a) of 34 Act) and 13Fs for other possible candidates (this is slow and tedious since there are several hundred filings). I'm thinking the investigation would focus on about 20 transactions. I am awaiting input from the NASD on other questionable transactions and Glascoe Stephen is getting a UAF update threw his contacts at the SROs.
2) I would like to get your feedback on this approach:
    a) Subpoena records from PQ on the selected 20 or so transactions after a formal proceeding is initiated;
    b) Simultaneously, if possible, get records from the primary broker for PQ on all PQ gains that meet certain screenable criteria, e.g., two months between acquisition and realized gain over $1,000,000.

I expect to have an overview for you next week.

Gary

From: Aguirre, Gary J.
Sent: Tuesday, July 19, 2005 12:00 PM
T : Kreitman, Mark J.; Hanson, Robert
Cc: Ribelin, Eric; Eichner, Jim; Jama, Liban A.
Subject: Lynch

Lynch will thus be in a position to have orchestrated the document production from both CSFB and Morgan Stanley relating to Mack. Having access to our CSFB and Morgan Stanley subpoenas, he should understand exactly where we are going.

Per earlier discussions, Lynch seemed to have an agenda that did not relate to my discussions with Patalino. I suspect Patlino is also leaving with Lunch (as he did from Davis Polk when Lynch Left) for Morgan Stanley. He turned the matter over to someone last week, saying he would be staying at home this week.

This puts in perspective brief call from Ashley Wall (Morgan Stanley counsel) on Friday, when she called to say there would be no more Mack e-mails. A week before she told me that they were still working on producing some additional e-mails relating to Mack and would be searching backup tapes. Her tone on Friday, which is usually fairly light, seemed strained. I asked her how she already knew that there would be no Mack e-mails in backup tapes, but her answer made no sense. She agreed to explain the reason in a letter. This was a mild red flag, but I did not make much of it because MS has been very cooperative until now.

Here's the language from our current subpoena:

1. All electronic mail sent to John J. Mack ("Mack"), or any of his secretaries, assistants, or others acting on his behalf, from January 1, 2001, through March 31, 2001, from Arthur J Samberg ("Samberg"), or from any agent, officer or employee of Pequot Capital Management ("PCM");
2. All electronic mail from Mack, or any of his secretaries, assistants, or others acting on his behalf, from January 1, 2001, through March 31, 2001 to Samberg, or to `any agent, officer or employee of PCM;
3. All electronic mail sent to Mack, or any of his secretaries, assistants, or others acting on his behalf, from March 1, 2001, through August 30, 2001, from any agent, officer or employee of MS; and
4. All electronic mail from Mack, or any of his secretaries, assistants, or others acting on his behalf, from March 1, 2001, through August 30, 2001 to any agent, officer or employee of MS.

I suggest another call to Ashley tomorrow or Thursday with Liban, Jim, or both to pin down exactly the situation on the Mack e-mail subpoena.

From: Aguirre, Gary J.
Sent: Friday, August 26, 2005 3:42 PM
To: Kreitman, Mark J.; Hanson, Robert; Eichner, Jim; Ribelin, Eric; Jama, Liban A.
Subject: S/L will soon be an issue in GE/Heller 10b against Samberg

I have previously stated my views on the examination scheduling.

But the Harnisch-Iason play—and that's what it is--is a reminder of our S/L problem. Assuming we schedule Samberg's testimony a week after Dartley's, which tactically makes the most sense, the five year Statute of Limitations for 10b will begin to expire in eight months and will fully expire in *nine*.

From those eight to nine months, you can subtract very liberally for Thanksgiving and all Christian and Jewish holidays. You can bet all defendants have this in mind and are acting in collaboration to drag out our investigation.

We have miles to go before we could file a 10b action against Samberg and the investigation on these examinations and other aspects has slowed to a snail's pace. I do not see why are so relaxed about the scheduling on these exams and others. It may bite us in the end.

From: Aguirre, Gary J.
Sent: Friday, October 08, 2004 9:17 AM
To: Grime, Richard; Cain, Charles
Subject: Why is Enforcement now bringing Pequot?

Richard and Charles:

With training over, I will soon redraft and resubmit the Pequot action memo. I assume our primary concern is the memo's accuracy since it will be circulated among the Commissioners. In this regard, the proposed revisions would now offer this case history: The NASD referred the Elite Information matter to Enforcement in August 2003 and then, "Subsequent investigation by the staff identified at least six transactions involving possible insider trading by the Pequot Management and one or more Pequot Funds."

This statement is unsupportable. Neither I nor anyone on the staff has discovered an insider trading transaction involving Pequot. Yes, I have prepared a spreadsheet of suspected Pequot insider trading activity since 1999. However, in each one of those 11 cases, an *SRO identified* the transaction and referred it to Enforcement (Market Surveillance), where it stopped. Under these circumstances, the quoted revision is not merely unsupportable; it could be the source of embarrassment or worse for each of us.

By the way, I am not saying that Joe Cella made a mistake. Indeed, for the reasons discussed next, I think his decisions made sense. But first, a little background.

At yesterday's training session, Laura Joseph introduced Hilton Foster as the most knowledgeable person on insider trading at Commission. He lived up to his billing. I discussed the Pequot case with him yesterday afternoon. Cutting to the chase: he considers Arthur Samburg and Pequot to be "serial inside traders." He tried to make a case against them a decade ago, but failed. He says our case will be extremely difficult, but it must be brought. He has agreed to work with me on the case, subject to your approval.

So, I suggest we say something like this: Enforcement and the SROs have been aware of suspicious insider trading activity by Pequot for sometime. The Commission *unsuccessfully* pursued a case against Pequot in the mid-90s. Until now, the referrals have been suspicious, but we were not been able to develop a probable info flow. Elite and an August referral, Blue Coat Systems, give us that linkage. Further, over the past two years, the Pequot referrals from SROs have registered a marked increase. Hence, we've decided to pursue what promises to be a tough case.

Incidentally, during Enforcement training over the past few days, Commissioner Campos and other speakers have encouraged the new staff to bring "the tough case" and candidly inform the Commission when that is being done.

Shall we discuss?

Gary

From: Ribelin, Eric
Sent: Thursday, February 03, 2005 9:23 AM
To: Aguirre, Gary J.
Subject: RE: Pequot

Gary,
I just stopped by. Good idea, but it's not quite so easy. The referrals are by issuer, not by account that traded, so there is no electronic way to key on it.

Put it this way, before you mentioned Andor I'd never heard the name. I've seen and heard Pequot's name for years in referrals and in conversations with SROs.

Eric.

Total One, Five and Ten Year Returns for Funds Managed by the Registrant as of June 30, 2002

Fund Name	Inception Date	1 Year Return (%)	3 Year Return (%)	5 Year Return (%)	10 Year Return (%)	Since Inception (%)**
Pequot Partners Fund, L.P.	Oct-86	-10.6	48.9	178.6	701.1	
Pequot Endowment Fund, L.P.	Nov-93	-4.7	56.5	160.7	—	403.5
Pequot Telecommunications and Media Fund, L.P.	Apr-00	-3.2	—	—	—	59.6
Pequot Telecommunications and Media Institutional Fund, L.P.	Dec-00	-3.5	—	—	—	20.4
Pequot Scout Fund, L.P.	Jan-94	13.7	109.1	228.7	—	677.6
Pequot Healthcare Fund, L.P.	Jan-98	0.0	236.6	—	—	485.7
Pequot Healthcare Institutional Fund, L.P.	Dec-00	0.2	—	—	—	0.6
Pequot Select Fund, L.P.	Jan-02	—	—	—	—	21.2
Pequot International Fund, Inc. (Class A shares)	Sep-02	-11.3	49.9	178.6	—	868.9
Pequot Telecommunications and Media Offshore Fund, Inc. (Class A)	Apr-00	-2.5	—	—	—	61.6
Pequot Navigator Offshore Fund, Inc. (Class A)	Sep-00	10.7	—	—	—	34.7
Pequot Healthcare Offshore Fund, Inc. (Class A)	May-98	-0.5	228.1	—	—	238.8

Above returns are net of all fees and expenses and represent the trailing total returns for a limited partner/shareholder through 6/30/2002. The returns represent a limited partner's returns who participates in initial public offerings. Class "A" represents a shareholder's returns who participates in initial public offerings.

*** Indicates returns since inception for the funds which were formed less than 10 years ago.*

-----Original Message-----
From: Hanson, Robert
Sent: Friday, June 03, 2005 2:13 PM
To: Aguirre, Gary J.
Subject: Re: Possible tipper new Pequot Chairman?

they may feel they have some enterprise exposure and want to avoid an indictment of the firm by bringing in an outsider to give the appearance that things are cleaned up (audrey did this before on the case I wordked on) or they may be bringing him in so they are all peeing out of the same tent so to speak.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Ribelin, Eric <RibelinE@SEC.GOV>; Foster, Hilton <FosterH@SEC.GOV>; Eichner, Jim <EichnerJ@SEC.GOV>; Conroy, Thomas <CONROYT@SEC.GOV>; Glascoe, Stephen <GlascoeS@SEC.GOV>; Miller, Nancy B. <MillerNB@SEC.GOV>
CC: Hanson, Robert <HansonR@SEC.GOV>; Kreitman, Mark J. <KreitmanM@SEC.GOV>
Sent: Fri Jun 03 08:36:07 2005
Subject: Possible tipper new Pequot Chairman?

John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. Mack moved from Morgan Stanley, adviser in Heller acquisition, to CSFB, also adviser in Heller, in late July 2001, the month of acquisition. The are hundreds of Pequot e-mails referring to Mack, including a dozen in July 2001. See e-mail below between Samberg and his son referring to Mack ("It's nice to have friends in high places...:)" Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets? Please note the happy face which has already come up twice in relating to possible flow of insider info. Ironically, Mack's article quoted below is C-1 of WSJ, just as was when Samberg's exchanged e-mails below.

John Mack to Join

From: Aguirre, Gary J.
Sent: Wednesday, July 27, 2005 11:36 AM
To: Berger, Paul
Subject: My resignation

Paul:

By this e-mail, I am rescinding my resignation of June 30, 2005.

Sincerely,

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: 202-551-4437
Fax: 202-772-9236
mailto: aguirreg@sec.gov

GARY J. AGUIRRE

October 11, 2005

Via Facsimile to 202-772-9200 and Regular Mail

Chairman Christopher Cox
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549

Re: Request for Preservation of Documents

Dear Chairman Cox:

You may recall my letter of September 2, 2005, in which I contend the Division of Enforcement ("Enforcement") terminated my employment for unlawful reasons. Among those reasons was the fact that I objected up the chain of command about the special treatment Enforcement was giving John Mack because, as my supervisor explained to me, he has "powerful political connections."

I now have reasons to believe that senior Enforcement staff members are tampering with Commission records to justify my termination. On September 19, 2005, I obtained what Enforcement and Human Resources told me were complete copies of my personnel files. However, key documents were missing. After repeated requests, Enforcement provided additional documents to me on October 6. These documents fall into two distinct categories. First, there are those that Enforcement routinely generated in connection with the evaluation of my work, just as it does with all other staff. These include the Performance Plan and Evaluation for 2004-2005, the Performance Assessment for 2004-2005, and my Branch Chief's specific comments evaluating my work for the same period. Without exception, these documents demonstrate my work met or exceeded all Commission standards. Based on these records, the compensation committee determined my 2004-2005 work justified a two-step pay increase, which you approved.

But another putative evaluation of my work for the same time period has found its way into in my Enforcement personnel file during the past week. This one was prepared by my Assistant Director, Mark Kreitman, at the suggestion of Associate Director Paul Berger. According to Enforcement's transmittal memorandum, Mr. Kreitman's evaluation "mistakenly did not go to the compensation committee." Curiously, Mr. Kreitman's evaluation is dated September 26, 2005, three months after my Branch Chief submitted his evaluation to the compensation committee, more than a month after the compensation committee acted, more than three weeks after Enforcement fired me, and one week after I requested my personnel file. In short, it was not prepared in the ordinary course of events.

The bottom line is this: since lawful grounds do not exist for my termination, senior Enforcement staff is retroactively creating fictitious ones. The fact that senior staff is willing to retroactively paper my file to justify my termination raises serious concerns regarding the integrity of my personnel files as well as all other documents relating to my work with the Commission. Put differently, if documents can retroactively be added to my personnel files, other probative documents may vanish.

I am therefore requesting that you instruct Linda Thomsen, as the Director of Enforcement, to direct Enforcement staff to preserve all memorandums, emails and other documents, as that term is used by Enforcement, relating to my employment and work with the Commission. These records will be critical for the courts and other governmental agencies to determine if Enforcement violated federal law by firing me.

Very truly yours,

Gary J. Aguirre

CC: Paul S. Atkins
Roel C. Campos
Cynthia A. Glassman
Annette L. Nazareth
Linda Thomsen
(By fax and Regular Mail)

1528 CORCORAN ST NW • WASHINGTON, DC • 20009
PHONE 202-232-1803 • FAX 202-328-0562

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

August 22, 2006

Via Facsimile

Nick Podsiadly
Counsel
Committee on Finance
U.S. Senate
219 Dirksen Senate Office Building
Washington, D.C. 20510-6200

Re: Pequot Capital Management

Dear Mr. Podsiadly:

I am writing to confirm our discussions of earlier today regarding Senator Grassley's August 21, 2006 letter to Chairman Cox concerning the pending request for information related to the Securities and Exchange Commission's ongoing investigation involving Pequot Capital Management (PCM). At the outset, I wish to reaffirm our intention to respond promptly and in detail to this inquiry.

In my August 9, 2006 letter to you, I noted the various Commission rules that restrict the ability of staff members to disclose information from ongoing investigations. As a member of the Commission's staff, I am subject to those limitations. You will note that one provision I cited, and that was also quoted in Senator Grassley's letter, provides that "the Commission" may authorize the staff to disclose information from ongoing investigations. Accordingly, as I mentioned in my letter of August 9, 2006, I arranged for this matter to be heard at the Commission's August 29, 2006 meeting, which is the first meeting where I could present this matter. Senator Grassley's letter urges us to use other procedures to have this matter decided by the Commission at an earlier date. As I indicated in our conversation, while the Commission does have duty officer and seriatim procedures, in my view, those procedures are not appropriate for this matter because they do not provide for joint deliberations among the Commissioners.

Senator Grassley's letter also requests that we make available immediately: (1) the SEC/IG's closing memorandum in the Aguirre matter; and (2) a two-page summary memorandum regarding the status of the investigation involving PCM. When those documents were shared with the Senate staff in June, it was pursuant to specific Commission authorization as to the manner in which the documents could be reviewed. Thus, I have to obtain prior Commission

approval to release those documents without observing those protocols. However, I assured you that this matter will be addressed at the August 29th Commission meeting.

We also discussed the scheduling of Commission staff members for interviews pending Commission consideration of this matter. I stated that we would contact the individual staff members regarding their availability and develop a tentative schedule and contact you on Monday August 28th to discuss timing.

Once again, we look forward to helping to assure your Committees and the public as to the integrity of the Commission's investigative process.

Sincerely,

Richard M. Himes
Associate General Counsel

cc: Jason Foster, Senate Committee on Finance
Emilia DiSanto, Senate Committee on Finance
Harold Kim, Senate Committee on the Judiciary
Justin Daly, Senate Committee on Banking, Housing, and Urban Affairs

Gary Aguirre

From: Aguirre, Gary J.
Sent: Thursday, February 17, 2006 2:04 PM
To: Humes, Richard M.
Subject: FOIA request

Mr. Humes:

Do you have an open door policy? I was recently privy to some disturbing comments regarding your office's policy in responding to FOIA requests. I would like to find out the facts first hand.

Sincerely,

Gary Aguirre

From: Aguirre, Gary J
Sent: Monday, June 27, 2005 7:42 AM
To: Hanson, Robert
Cc: Kretzman, Matt J.; Ribelin, Eric
Subject: Samberg's trading in HF and GE

This memo summarizes the evidence, especially Samberg's own testimony, suggesting that he acted on confidential information in making his trading decisions on GE and HF. This memo supplements but does not repeat the information contained in the Excel spreadsheet that chronicles the events leading up to the public announcement of the GE-HF acquisition.

A) Samberg's wanted to buy more HF and short more GE

On July 30, 2001, General Electric announced its acquisition of Heller Financial ("HF") at approximately a 50 per cent premium to its last trading price. From July 2 through July 27, 2001, Samberg purchased 1,148,200 shares of Heller for a purchase price of $43,839,784.43. His profit on HF, according to PCM records, was $16,939,578.52.

Samberg wished to buy significantly larger blocks of HF during July 2001, particularly during the week before the public announcement. On July 2, the first day he directed in PCM, he directed the purchase 223,700 shares; only 100,000 shares were filled. The total trading volume on that day was 388,900 shares. On July 10, 2001, Samberg directed his PCM trader to purchase 455,300 shares; only 100,000 shares were filled; trading volume was 375,600 shares. On July 11, Samberg's order was for 336,500 shares; only 56,500 shares were filled; volume that day was 158,700 shares. During the week of July 23, 2001, the week before the public announcement, Samberg directed his traders to purchase 488,400 on Monday, 418,500 on Tuesday, 373,000 shares on Wednesday, 302,900 shares on Thursday, and 243,900 on Friday. His trader purchased only 10,000 on Monday, 18,500 on Tuesday, 10,000 on Wednesday, 20,000 on Thursday, and 10,000 shares on Friday. On July 30, 2001, the day of the announcement, Samberg had a standing order to purchase 233,500 shares. Later that day, after the announcement, he sold his entire holdings of 1,148,200 shares.

Likewise, Samberg engaged in heavy short sales of GE beginning on July 25, five days before the public announcement of the acquisition. On July 25, he directed his trader to short sell 766,600 shares of GE. It was fully executed. On July 26, he directed his trader to short sell an addition 385, 200 shares of GE; only 50,000 were executed. On July 27, Samberg instructed his trader to short sell an additional 385,500 shares of GE; only 20,000 were executed.

The point is this: Samberg risked $80,000,000 of PCM assets belonging to sophisticated institutional investors. He wanted to risk much more. This suggests that he had extraordinary confidence in PCM's research in GE and HF or that for some other reason he believed HF's price would go up and GE's would fall. This memo next takes a look at PCM's research on both sides Samberg's GE-HF bet.

SEC 000771

[redacted]

B) Samberg's explanation why he bought Heller Financial (HF) is not credible.

1) Samberg regurgitated information during his testimony why he purchased HF that was spoon fed him by his attorneys.
   a) Samberg identifies six reasons he purchased HF's stock: (1) credit climate that existed in 2001 was favorable for HF; (2) HF's strong financial model; (3) speculation that HF would be involved in a consolidation; (4) analysts' reports described the attractiveness of the HF franchise; (5) the relative performance of HF vs. other financial stocks; and (6) analysts' reports that HF was growing at ten percent and was projected to continue that growth (RT II, p. 67, l. 2 – p. 69, l. 22).
   b) Each data point was described in the materials shown to Samberg by his counsel shortly before he testified (RT II, p. 75, ll. 25 – p. 80, l. 19).[11]
   c) *Five of the six items above were contained in Legg Mason report that Samberg did not see until months after he purchased HF.*
   d) Samberg claims he saw an analysts report in July 2001 like the one his attorneys showed him. PCM has produced no such report. No is there a hint of one in the PCM production. Here's Samberg's testimony on the report shown to him by his attorneys:
      Q Have you seen this report in any e-mail dated before July 30, 2001?
      A I don't recall seeing it.
      Q Do you have a high regard for sell side analysts?
      A I have a high regard for them as people. I don't have a high regard for using their reports to make investment decisions.
      Q It would have been very unusual for you to rely on a sell side report, would it not, in making an investment decision?
      A Historically, that is true.
      Q In fact, isn't it true, sir, that you don't think they're worth a damn?
      A In general, I don't think their reports are worth a damn. The people can be, but not the reports.
      Q Right. And you've made that statement publicly. Have you not?
      A I have.
      Q So this is – Exhibit 19A is sell side research, is it not, sir?
      A Sure is.
      Q Exactly what you said isn't worth a damn. Correct?
      A You bet.
      Q So is it fair to say that the research you saw in July 2001 about Heller Financial also wasn't worth a damn?
      A I really don't know what I saw.

2) Samberg consulted with no one, contrary to PCM practices, before and during his trading in HF.
   a) Samberg did not communicate with anyone at PCM before buying HF. (RT I, p. 70-71)
   b) No one assisted Samberg in making the HF trading decisions in July 2001. Samberg made a decision not to seek the help of any of the 250

[11] When it was established that Samberg was spoon-fed information by his attorneys as reasons he purchased HF, he attempted to create thirty new reasons for his trading decisions (RT II, p. 81, ll. 2-25).

people who worked at PCM in connection with his decision to buy HF (RT I p.112, ll. 16-23).

c) Samberg can recall no discussions with anyone at PCM regarding his decision to purchase HF (RT I, p. 71, p. 81, l. 9-15).

d) Samberg has no recollection of speaking with anyone employed with HF before making the decision to purchase HF (RT I, p. 71).

e) Samberg can recall no discussions with any financial services firms or brokerage firms or consultants before making his decision to invest in HF (RT I, p. 81, l. 22 – p. 83, l. 4).

f) Samberg does not recall speaking to any analyst about HF when he was purchasing the stock (RT II, p. 55, l. 23 p. 56, l. 6).

g) Samberg does not recall speaking with anyone about HF before or during the period the period he purchased it (RT II, p. 56, l. 14-17).

h) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. [See PCM "due diligence" section below.]

3) No PCM documents were generated when Samberg purchased HF except trade tickets.

a) Samberg maintained no hard copy or electronic files relating to his decision to buy HF (RT I p. 69 ll. 11-14).

b) No one prepared any files regarding Samberg's decision to trade in HF (RT I, p. 79, l. 24 – p. 80, l. 4).

c) Samberg could not identify any analyst report that he claims to have read before his decision to buy HF in July 2001 (RT I p. 70, ll 18-22) [Hard to understand why Samberg would consider any analyst report because, according to him, "analysts' reports aren't worth a darn."

d) Samberg also testified at the second session that he does not recall seeing any analyst report before or during the time he was purchasing HF's stock (RT II, p. 56, l. 7-13).

e) PCM produced only two documents relating to Samberg's decision to purchase HF stock. One is an e-mail dated July 11, 2001, from Samberg to his chief trader which states "where are we on HF?" The second is also an e-mail sent from Samberg after the July 30 announcement of the acquisition. It contains only the following symbols: :) :) :) :) :) :) Samberg can recall no other e-mails (RT I p. 108 ll. 23-25).

f) Samberg has no recollection of seeing any newspaper articles about HF before buying the stock (RT I, p. 72).

g) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. [Also, see PCM "due diligence" section below.]

4) Samberg did no home work on HF before purchasing $44 million of its stock.

a) Samberg did not closely follow HF "in the way people follow stocks before it was purchased" (RT I, p. 72)

b) Samberg had "no recollection specifically of how I started the Heller investment other than to know that I had been doing this for many years and recognized these opportunities when they come up" (RT I, p. 74).
c) Samberg's decision to purchase HF in July 2001 had "nothing to do with Heller (RT I, p. 74-75)." Rather, "it was everything to do with the charge I had, which was to manage an important piece of money for clients" (RT I, p. 75).
d) All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. Also, see PCM "due diligence" section below.

5) HF was not in an industry that Pequot covered in 2001.
a) PCM and its Core Group, which Samberg managed, focused on technology, media, telecoms and healthcare in July 2001(RT I, p. 59-60)
b) HF was in the "financial services industry" (RT I, p. 75-76).
c) Samberg could not recall purchasing securities in this industry before July 2001 (RT I, p. 76, ll. 12-18).
d) PCM had no one who specialized in financial stocks when Samberg bought HF (RT I, p. 75-76).

C) Samberg could offer no explanation why he began a $36 million short of GE stock five days before the public announcement GE was buying HF.

Here's the transcript:

1 Q Now, two months later, almost two months later,
2 there is a short by you, sir, on July 25, 2001 in the amount
3 of 756,000 shares or just shy of $33 million.

4 Do you see that, sir? [I was showing Samberg GE trade blotter]
5 A I do.

6 Q Now, can you tell us the reasons that you felt that
7 GE should be shorted at that particular time?

8 A No, I can't.

9 Q Do you recall whether you were relying on technical
10 analysis or fundamental analysis?

11 A I can't remember anything about the trade.

12 Q Now, I notice that that was the largest trade made
13 in GE except for the sale – or, excuse me, the – well, that
14 was the largest trade in GE up until that point in time.

A There was a larger one in August.

Q Right. That's when it was covered, sir. I said up until that point in time.

A Okay.

Q You have no understanding at this point why you made that trade?

A No

Q Do you know why you made it just --

A Do you know how many trades I made that year?

Q Do you know why you made it five days before the public announcement on Heller Financial?

A No idea.

Q The next day, I notice the -- exactly one, two days later, on July 27th, you shorted another 34,000 shares of GE. Correct, sir?

A That appears to be the case.

Q Do you know why you shorted it on that date?

A No.

Q Do you have any recollection whatsoever?

A None.

Q Have you attempted to ascertain from any records what caused you to trade --

A Well, first I have to realize that I did do it. So no, I made no ascertations.

Q Now, do you have any explanation why you had $80 million invested in GE and Heller Financial a few days before a public announcement of the --

17 A $80 million is what?

18 Q You had 44 million in Heller Financial. You had
19 36 million in GE.

20 A You're linking the two. I'm not willing to do
21 that. That's -- I don't understand that at all.

22 Q Thank you. So they weren't linked in your mind?

23 A They were or were not?

24 Q They were not linked in your mind at that time?

25 A No.

(Samberg's above testimony that his GE and HF trades were not related is inconsistent with his testimony (see below) that he bought because there was speculation of a merger. Since he is lying, it's hard for him to keep his story straight.)

D) Samberg's $80 million trades in HF and GE cannot be reconciled with his description of PCM's due diligence procedures in 2001 for making such trading decisions.

Samberg's testimony below follows his identification of a pamphlet delivered to PCM investors describing PCM's "due diligence" procedures in making trading and investment decisions. Samberg's decision to buy HF without consulting with any of PCM's 250 employees, without speaking at HF, without following HF, and without researching HF cannot be reconciled with PCM's customary "due diligence" before making such decisions. Two points: he didn't need to do a "due diligence" because he had the info; he violated PCM's practices or he's lying about how he made the decision.

9 Q And in the first sentence, it says, "This due

10 diligence package was created by Pequot Capital Management,

11 Inc. for current and prospective investors and their

12 immediate affiliates."

13 Is that correct, sir?

14 A Yes.

15 Q Now I'd like to ask you to turn over to page 8.

PCM-081626. And under Roman numeral V, "Investment Style and Strategy," I'd like you to focus on item 1. And I'm going to read it, the first sentence, and I'm going to ask you if it's a true statement.

"Describe the development of your investment approach and how investment ideas are generated." So this is -- the statement follows. "Pequot Capital's investment process begins with an intensive research of a company's underlying fundamentals."

Is that a correct statement, sir?

A Yes.

Q Was that correct in 2001?

A Yes.

Q. "Investment ideas are generated as a result of meetings directly with company senior management teams."

Is that a correct statement?

A Uh-huh. Yes.

Q Is that correct in 2001?

A Yes.

Q "This allows the investment team to understand a company's management structure, thought process, strategic direction, and products."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes, it was.

Q "In-depth meetings and industry research provides the research to prospective fund's analysts with an overview of a particular industry as well as the individual company, and allows for comparisons to be made within that specific industry."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes.

Q "The investment staff visits thousands of companies each year, conducts extensive interviews with management as well as competitors, suppliers, distributors, and customers."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes.

Q "Based on research, the investment analyst is able to formulate business models and discuss their ideas with other members of the investment staff and the respective fund's portfolio manager prior to a position being included

12 within the portfolio."

13 Is that a correct statement, sir?

14 A Yes, it is.

15 Q Was it a correct statement in 2001?

16 A Yes, it was.

17 Q "The portfolio manager makes the ultimate decision

18 as to whether or not a position will be added to the

19 portfolio."

20 Is that a correct statement?

21 A Yes.

22 Q Was it a correct statement in 2001?

23 A Yes, it was.

24 Q "The investment approach is consistent across all

25 funds managed by Pequot Capital."

1 Is that a correct statement?

2 A Yes, it is.

1 Is that a correct statement?

2 A Yes, it is.

3 Q Was it a correct statement in 2001?

4 A Yes, it is.

E) What does Zilkha-MSFT tell us about Samberg?.

As you know, however, there is a missing link in GE/HF: If Samberg traded on material nonpublic information (MNI), where did it come from? There are no e-mails to or from Samberg referring to any contacts with GE, HF, or any of the investment bankers

involved in the acquisition. The Samberg-Zilkha e-mails show how Samberg operates. They again and again show Samberg using Zilkha to get MNI from Microsoft. One shows Samberg asking Zilkha "those [MSFT] contacts have any views on the direct tv – Murdoch –rumored as/fi possible deal?" This does not prove the OE-HF case, but doesn't it suggest why Samberg's explanation makes no sense on HF and why he has none on GE? Beyond a reasonable doubt on OE-HF? Not yet. Meet the preponderance of the evidence burden? I'll get back to you after Samberg testifies on Zilkha. I have also asked Nancy to do an Excel spreadsheet on the Samberg-Zilkha-MSFT trades.

F) Was John Mack the tipster?

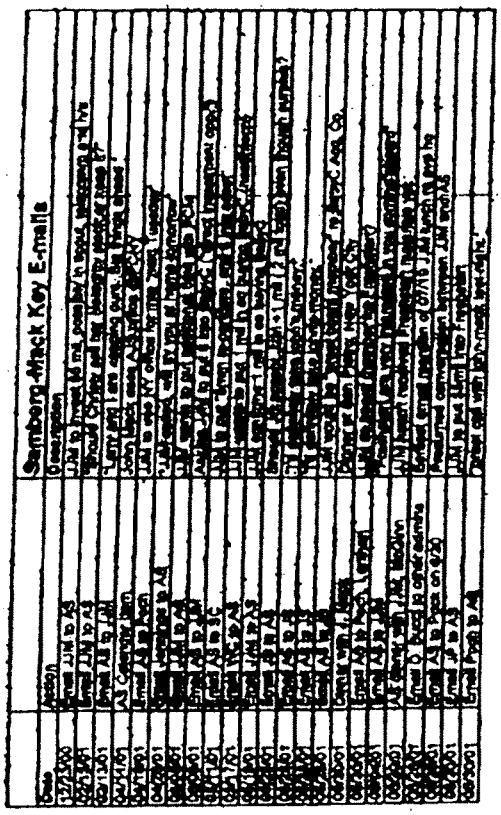
You have the Excel spreadsheet. I will get the revised, edited version to you by tomorrow. In summary, Mack likely had the OE-HF info sources, he had contacts with Samberg during the period, there was *quid pro quo*, mutual trust existed, and Samberg needed a huge favor. Samberg's need for a big favor is a new idea. His company was splitting a part. Benton was a younger and brighter light. Benton's performance was demonstrably superior to Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on OE-HF would illustrate that his fast ball had not slowed. Regarding OE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session.

> The company was about to split, it was about to split. In September '00, [redacted] and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and *I did things in a manner that was expedient at the time given my expertise in this area.*

In a similar vein, he testified at the second session.

> My firm was going to split in three months. These people were my other managing director partners. *Times were fragile.* I needed their approval to do whatever I wanted to do *or they might walk.* So I wanted them to meet anybody that I was interested in talking to to building out the platform.



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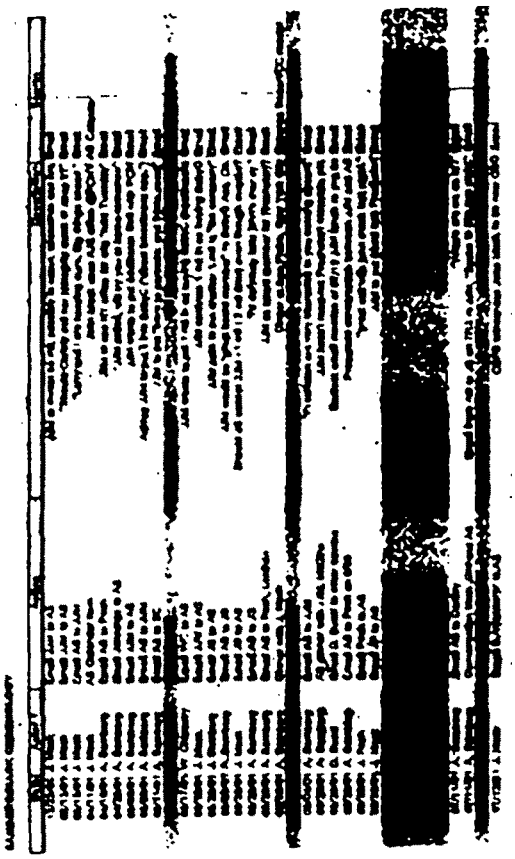

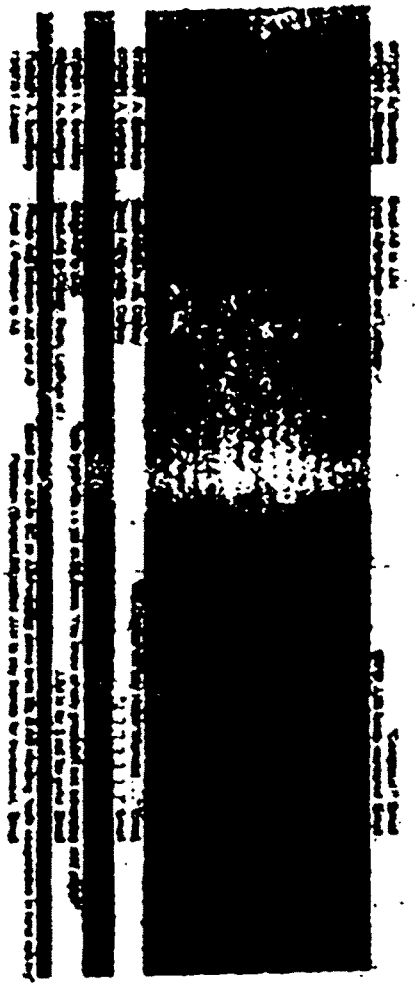

From: Sternberg, Art
If: Saturday, June 30, 2001 1:41 PM
Poch, Jerry
Subject: RE:

As he might have mentioned, he called here looking for you. Out of one breakfast I understand you were in vail and gave him your number. Glad this is moving along, and thrilled at the 50mm number. Are you in the ay/ct spa the week after next? I'd really like you to meet the distressed guys I've uncovered.

-----Original Message-----
From: Poch, Jerry <[redacted]
To: Sternberg, Art <
Sent: Sat Jun 30 13:58:31 2001
Subject: RE:

I had a grueling call with john smack last night. he wants us to go forward with freshstart and got back to. I will set up a meeting next after next with the la folks. we also chated about rich and I gave him my input. he was very appreciative and confirmed that kim is to enrolled a rat. by the way, he said he might have to low key initial customs: contacts for freshstart from dealer days beginning he might end up handing another flim-mucrill. I told him that was fine and thought you would be interested.

-----Original Message-----
From: Sternberg, Art
Sent: Friday, June 29, 2001 9:31 PM
To: Schwedel, Jerry
Cc: Bronch, Mark; Poch, Jerry; Leatham, Larry; Clancy, Sheila; Gilbert, Kevin; Bartley, Peter
Subject:

When I sent my email concerning a meeting next week I did not realize the mkt would close at 1:30 and people would be leaving for vacations. What are your availabilities the week after next? Pls designate to vary

Hanson, Robert

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 12:09 AM
To: Hanson, Robert
Subject: RE: Mack testimony

Bob

While you were on vacation, Mack informed me that I would have to establish that Mack "went over the wall" before I could take Mack's testimony and ask him whether he went over the wall. This makes no sense to me.

Further, Paul had asked me to send him my assessment why it was necessary to take Mack's testimony and I delayed it in hopes that the assessment would be reviewed objectively. Since Mack has already made up his mind, I see no point in further delaying the analysis that Paul requested.

Gary

From: Hanson, Robert
Sent: Tuesday, August 23, 2005 1:08 PM
To: Jarin, Lilian A.; Aguirre, Gary J
Subject: FW: Mack testimony

Please take a look at this – if possible before we meet with Mark.

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:34 PM
To: Hanson, Robert
Subject: Mack testimony

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Refco investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information

The first element is whether Mack had possible access to information that GE would make a tender offer for RF. He had access from two sources: he had been the CEO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before

Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time. Also, CSFB was "wooing" Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or CS to mention, as part of this wooing process, what inventory Mack would be taking over. Incidentally, we know how Sandberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HE during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team at Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller

a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Locent spin-off bought cheap), $2 million into Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "busting his chops" Samberg's chops because he had not got the documents on this investment. Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough

estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) *Board seats* As shown on one of the spreadsheets, Samberg was promoting Mack for board seats on both Baby C and Fresh-start.

c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.

d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."

e) *Friendship* Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo.

f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Samberg had a relationship of trust deep friendship with Mack

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend

In July 2001, Samberg's company was splitting apart. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, I had an acute medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and *I did things in a manner that was expedient at the time given my expertise in this area.*

In a similar vein, he testified at the second session:

My firm was going to split in three months. These people were my other managing director partners. *Times were fragile.* I needed their approval to do whatever I wanted to do *or they might walk* (emphasis added).

There do not appear to be other leads in the Samberg e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Samberg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason *for* not proceeding with the examination? Very possibly yes, given Samberg's circles.

Gary

Hanson, Robert

From: Aguirre, Gary J
Sent: Wednesday, August 03, 2005 1:18 PM
To: Eichner, Jim; Hanson, Robert; Jama, Liban A.; Ribelin, Eric
Cc: Miller, Nancy B.; Eichner, Jim
Subject: RE: Developing other possible GE-HF tippers

Not exactly an assumption. More of a working hypothesis that tip went directly to Samberg. Got there because all other trails came up dry and continue to do so--and more and more evidence pointed to the tip going directly to Samberg.

But take a stab at it. Who knows, could lead somewhere

About your specific suggestions

#1 I have subpoenaed e-mails for possible contacts in suggestion #1—investment banking and Pequot—have come up with nothing interesting so far. While it's possible someone may admit a contact four years ago without being prompted with a document, does not seem to happen very often. Would you ask per subpoena or request for information?

#2 This has not been completely done. I have checked the ones that I thought were most probable and came up with nothing. But we now have the 3 6 million On Site database we could check. If someone has the time, the rest could be checked, about 110 names.

#3 The idea is good, but the approach may not be practical. Pequot went through major restructuring during the two months just after the HF trades, because Benton walked a way with half the staff.

I have focused on the Core Group because that's the one that is directly managed by Samberg. That's how I found Zilkha. But your suggestion reminds me that I never got around to checking out Mark Hanrahty who was effectively Zilkha's replacement. Might be worth some time to check him out.

My own favorite is to try to trace some money back to a tipper through bonuses, but this came up dry.

About Nancy's idea, that was done last October when I did the first spreadsheet on the case. It was expanded into a huge project over a couple of months that thus far has not produced much. The most interesting possibility is Iridian, which we are still bluesheeting.

From: Eichner, Jim
Sent: Wednesday, August 03, 2005 9:02 AM
To: Aguirre, Gary J.; Hanson, Robert; Jama, Liban A.; Ribelin, Eric
Cc: Miller, Nancy B.; Eichner, Jim
Subject: RE: Developing other possible GE-HF tippers

My thoughts after reading Gary's memo.

It seems like our efforts so far have been based on the assumption that Samberg got the tip directly. While this seems like the most likely explanation, it may not be the only possibility. The Microsoft trading shows that Samberg wasn't that risk adverse in following tips (especially when they reflect inside information). As Gary astutely observed, the GE/Heller trade was at a time of desperation for Samberg given the impending break up of

SEC 00000

7/5/2006

Pequot. The break up also may have given other Pequot employees the incentive to try and make hay with Samberg in an attempt to move up the corporate ladder when Pequot split (what better way to curry favor than inside information on GE/Heller.

To me this suggests broadening our focus from Samberg to Pequot as a whole. I have only a couple of thoughts of how to do this and would welcome others. Forgive me if these have already been done.

1) Have each person who knew about the deal at the five investment bankers and GE/Heller identify who they knew at Pequot at the time of the deal.
2) Search all Pequot email to everyone at the five investment bankers and GE/Heller
3) Try and identify anyone at Pequot who got promoted soon after the GE/Heller deal

Nancy had a very good idea which I will pass along. She suggested going through all the rolodexs we got on Pequot and looking for common people/routes

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From: Aguirre, Gary J.
Sent: Thursday, July 28, 2005 7:03 AM
To: Hanson, Robert; Jama, Liban A.; Ribelin, Eric; Eichner, Jim
Subject: Developing other possible GE-HF tippers

I circulated my June 28 memo yesterday to Jim and Liban, but later remembered that it explicitly assumes knowledge of my June 27 memo. I am therefore attaching that memo. I also thought I should put Eric and Bob on the recipient's list, so I am attaching both memos to this e-mail.

Following up on the discussion yesterday, I am also attaching the part of the Samberg exam where I asked him about his acquaintances at Morgan Stanley in 2001, to be distinguished from the questions about his contacts with anyone at MS who had any involvement in the acquisition. Like John Mack, most of these people are fairly prominent, e.g., Byron Wien. I did not run thorough searches on Onsite's or our databases for those on Samberg's Morgan Stanley acquaintance list. Although I have my doubts from my review of Samberg's e-mails, it is conceivably possible to develop the facts suggesting a possible tipper: trust relationship with Samberg, possible access to info, contacts with Samberg at key times, and motive to pass along tip.

However, if you get that far, there will remain another obstacle as I understand our current thinking – establishing evidence that the person "went over the wall" before you can take his or her exam. I suspect that will not be easy to do

- Eric Dinallo Morgan Stanley
  urgent message

? Bob Craig

ED ? - obviously need process; brief on type of request
- If Mack is being investigated I understand
- Board in days away
- Don't want to do more or break all the rules

MK - Make note to come back?

ED - Real possibility if Ted he would come back
- know you can't tell me why much but but ...
- politically hard to discuss investigation but if
he is a target of investigation
- don't think we should
- don't know whether it is a shot in dark

MK - Eric, perfectly reasonable request, we don't
have target, investigation in early stages - don't
know what will

ED - implied you had other sources of evidence
- don't want to bring
- if focused on him with articulable evidence
- government has responsibility to ...
- I need to know if just because he was
on CNBC

AIG - Let roll back

Eric Dondo
mentioned your call to Paul
Porter has his call you back
He'll call you back

SEC 000963

7 If Eric wants to talk give me a call

Tell Eric that I'll call him back

Unknown

From: Hanson, Robert
Sent: Thursday, August 04, 2005 11:01 PM
To: Ribelin, Eric
Subject: Re: Does 3 today work? If so we'll come up to see you Eric

Geez eric have I offended you in some way? I think the things we discussed today were reasonable not the opposite--especially considring that jim and I are far behing and still learning. I sensed that you were unhappy in the meeting today and I'm not sure exactly why. If you think there are issues we should address (including the oddities you mention) I'm happy to talk about them with you or anyone else. I'm very concerned that you feel there are considerations or discussions going on behind the scenes. Do you know something I don't?

Eric, I look forward to continuing to work with your team on this exciting project. Again you may need to be a little patient with us until we get a better handle on the facts and I apologize for that in advance. In the meantime, I'm always open to suggestions and ideas on ways to do my job better, and move the investigation along while keeping everyone motivated and happy.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Ribelin, Eric [redacted]
To: Hanson, Robert [redacted]
Sent: Thu Aug 04 21:33:20 2005
Subject: Re: Does 3 today work? If so we'll come up to see you Eric

Bob, I have to tell you I was nonplussed today about the suggestion that we hold off on going to cl hing. We had already discussed and agreed upon a plan of action (to send out all subpoenas simultaneously) and now the thought that we should go first to pequot, and essentially determine whether a sufficient reason exists to go to the other players, does not comport with how we usually do business (this is especially true given the documents on their face point to wash sales). In fact, I have been troubled by a number of oddities about decisions made on both sides (insider trading and stock manipulation) of this investigation. In the end I felt I needed to make a strong plee that we stick with the original plan (and to your credit you agreed), but the continued twists and turns that seem to be always put in the road are beginning to effect staff morale. if anything is effecting major decisions that I'm not made aware of, then it will obviously leave me wondering what is really happening. I ask you therefore, to apprise me of ANY behind the scenes discussions and/or considerations. I DON'T want to play politics, but I do want to do my job in a straightforward manner and absent intrigue. Thanks, Eric.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Ribelin, Eric [redacted]
To: Hanson, Robert [redacted]
Sent: Thu Aug 04 08:14:28 2005
Subject: Re: Does 3 today work? If so we'll come up to see you Eric

3 is fine.

Sent from my BlackBerry Wireless Handheld

[redacted]

-----Original Message-----
From: Hanson, Robert [redacted]
To: Ribelin, Eric [redacted] Richner, Jim [redacted]
Sent: Thu Aug 04 07:52:03 2005
Subject: Does 3 today work? If so we'll come up to see you Eric

Unknown

From: Hanson, Robert
Sent: Friday, September 09, 2005 12:13 PM
To: Ribelin, Eric
Subject: RE: Pequot

Sorry you feel this way. I know you have put a great deal of productive time and energy into the case.

-----Original Message-----
From: Ribelin, Eric
Sent: Thursday, September 08, 2005 10:52 PM
To: Hanson, Robert
Subject: Re: Pequot

Rob, I have serious misgivings about many decisions made in this investigation. I don't know what all has driven the decisions. Something smells rotten, though. (I'm accusing you of nothing). You seem like a good guy and you're certainly a good soldier, but I'm complicated by issues big and small about the course of events going back to january. I really do need to contemplate my involvement going forward.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Hanson, Robert [redacted]
To: Ribelin, Eric [redacted]
Sent: Thu Sep 08 22:26:07 2005
Subject: Re: Pequot

Does it make sense to meet to discuss or to meet with joe and mark? Or some combination? You don't seem happy and I'd like to try to work out issues that to me are so non-controversial. I'm willing to do what it takes.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Ribelin, Eric [redacted]
To: Hanson, Robert [redacted]
Sent: Thu Sep 08 21:17:35 2005
Subject: Re: Pequot

Rob, gary has been over this territory with you guys countless times before. Why are you so fixated on whether the size of the trade is aberrational? the circumstances that are germane have been articulated: trade by sanberg alone, no consultation with anyone at pequot, no research done but for a few sell side reports produced by his counsel as his basis (notwithstanding in his own words multiple times that wall st research "isn't worth a damn," selling short the acquiring company just before the announcement, etc. Etc. You guys have to STOP thinking that the size of a trade vis a vis the past is the only circumstance worth considering. These guys are smart, unlike one time insider trader who opens acct, trade options for first time and makes killing. That's not the paradigm we can go by. This is different. They are different!!!!!!!!!!

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Hanson, Robert [redacted]
To: Ribelin, Eric [redacted]
Sent: Thu Sep 08 20:06:54 2005
Subject: Re: Pequot

[redacted]

I had not known that pequot typically made 30 to 40 million dollar bets on stocks until your e-mail below. Your view makes sense and it doesn't make sense to conduct a multi-month exercise to determine what we know. You are also absolutely right that it is important to look at all the surrounding circumstances of the trade. It just makes it more difficult to prove a circumstantial case if the trades were consistent with pequot's past practices. If they weren't consistent with past practices, of course, Gumberg's credibility would also be further undermined.

I'd like to see Craig's analysis if it's handy. I haven't located any more memos from Gary but I'll check with Mark and the others. Let me know if you come up with anything on that front.

Thanks,

Bob

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Ribelin, Eric [redacted]
To: Hanson, Robert [redacted]
CC: Kreitman, Mark J. [redacted] Cella, Joseph J. [redacted]
Sent: Thu Sep 08 15:25:02 2005
Subject: RE: Pequot

They are a multi-billion dollar hedge fund. We have, I don't know, 20,000+ pages of trading over a four year period. If the question is whether they've made similar size trades in other companies I'm sure the answer is likely that they have. If the answer is "yes" is it exculpatory? Who do you want to go through all the trading to determine this? Do you want a list of all such trades? It will take weeks, or months, or more, to get the answer. Then, for this exercise to really be meaningful (assuming it's meaningful to begin with), it will require in-depth analysis. As it relates to whether the trade is unusual, look at everything surrounding the trade - not solely the size of the trade. That Gumberg said there was nothing unusual about the Heller trades is as predictable as the sun setting tonight in the Western sky.

The July '01 trades were the first trades in Heller. Craig Miller completed an analysis of trading, at Gary's request, in the common stock of GE. It should be in Gary's files. I can have Craig get you the spreadsheet if you would like.

If there are any other memos written by Gary that are germane to these issues, if you would forward them on I'd be appreciative. I'd like very much not to redo what has already been accomplished. I'm sure you feel the same. That said, I understand the need to get your arms around what's in-house. Gary put in 60-hour work weeks for just under one year. There is much information to absorb.

Thanks, Eric.

From: Hanson, Robert
Sent: Thursday, September 08, 2005 2:06 PM

To: Ribelin, Eric
Cc: Kreitman, Mark J.; Calla, Joseph J.; Jama, Liban A.; Fichner, Jim
Subject: Pequot

Just for context, since neither Mark nor Joe have the draft to do list for Pequot, I've attached it. Jim, Liban and I met this morning to talk about the logical steps to take for the three of us to take during the next week -- basically we concluded that we needed first to get our arms around what we have in house and what is still outstanding in terms of document production. As I mentioned to you I'd like to start meeting every week to discuss where we are going, what has been done, develop priorities, brainstorm, etc. The to do list is a first cut at doing that.

By aberrational trading, I'm referring to whether Pequot traded in GE and Heller at other times and whether he made similiar sized trades, or bets, with other companies. Samberg claimed in testimony -- in essence --- that the Heller trading was not so unusual. My recollection is that we don't have an answer to that question in Gary's memos. We will, of course, use Gary's memos to build on and below I've cut and pasted an e-mail from Gary below on Mack's testimony. There was at least one earlier e-mail that you were copied on also Eric and I will forward that to you in case you don't still have it. If there are other useful memos, please pass them on.

Thanks,

Bob

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information

The first element is whether Mack had possible access to information that GE would make a tender offer for HF. He had access from two sources: he had been the CRO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 23. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant

contacts with CSFB at each time. Also, CSFB was "wooing" Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or CS to mention, as part of this wooing process, what inventory Mack would be taking over. Incidentally, we know how Samberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HF during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team as Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller.

a) Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001. Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million into Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "beating his chops" Samberg's chops because he had not got the documents on this investment. Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) Board seats As shown on one of the spreadsheets, Samberg was promoting Mack for

board seats on both Baby C and Fresh-start.

c) Office Space Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.

d) Stock tips Sambarg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."

e) Friendship Mack and Sambery were close friends. Two months ago, Mack took over as CEO at Pequot. That Sambery would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Sambery had in Mack. I discussed how the friendship played as a motive in my June 27 memo.

f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Sambery had a relationship of trust deep friendship with Mack.

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Sambery have a different ring about them. In one e-mail, Sambary's secretary tells Sambery Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Sambery would feel comfortable calling on for a tip as big as HF and GE.

Sambery's need for a big favor from an old friend.

In July 2001, Sambery's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Sambary's. Sambery was recovering from heart surgary. Benton was leaving with at least half the company. Sambery was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Sambary's situation during this time frame, he testified at the first session:

The company was about to split, it was about to split; In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and I did things in a manner that was expedient at the time given my expertise in this area.

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. Times were fragile. I needed their approval to do whatever I wanted to do or they might walk (emphasis added).

There do not appear to be other leads in the Sambang e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Sambarg e-mails, his calendar, his credit card receipts and his phone slips. Milton, Eric, Nangy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Sambarg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Sambarg's circles.

From: Ribelin, Eric
Sent: Thursday, September 08, 2005 12:04 PM
To: Sansom, Robert
Cc: Breitman, Mark J.; Calla, Joseph J.
Subject:

Bob, the outline you just sent me has in the section "General Electric/Keller" an item in reference to preparing a memo outlining items discussed with Mark addressing "aberrational trading?" What does that mean? In preparing a memo for Mark, are you, Jim and Liban reviewing the several memos I understand were sent to you and Mark by Gary? If you have those memos could I see them? Thanks.

Mark, I'll copy you on these communications so Bob won't have to forward my emails to you.

SEC 000836

From: Gary Aguirre
To: Paul Berger and Mark Kreitman

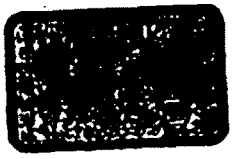
Re: Mark's e-mail of July 25

This replies to Mark's e-mail of July 25 replying to mine of June 28 (attachment 13), almost four weeks earlier. I wrote and sent my e-mail immediately after a heated discussion with Mark on June 28 memorializing what had transpired. I do not understand why it would take four weeks to reply and to tell me I had misunderstood him. I am also copying Paul because the timing of Mark's e-mail suggests it was triggered by my conversation with Paul on the same points late last week. Mark's July 25 e-mail reads:

> From: Kreitman, Mark I.
> Sent: Monday, July 25, 2005 7:15 PM
> To: Aguirre, Gary L
> Cc: Hanson, Robert
> Subject: RE: Mack and CSFB subpoenas
>
> I need greater specificity than the information provided here. Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall, is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view. The contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational. The fact that we have not identified other potential tippees is of only marginal significance. Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. The evidence of motive Mark cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. I have clarified the role of Irv and Larry, which should assuage your anxiety to some degree. I have at no time "denied [your] my request to proceed with the CSFB . . . subpoena." To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the sine qua non for focused investigation of Mack.

For ease of reference, I have separated the comments Mark made in his e-mail of July 25 into sub-points and then respond to each sub-point in the bracketed comments.

1) I need greater specificity than the information provided here. (My June 28 e-mail was not intended to specify the factual support for the Mack testimony-CSFB subpoena course of action. It merely confirmed my understanding that Mark had rejected both courses of action during the heated meeting we had a few minutes earlier. The factual support for these two steps was discussed in the two lengthy e-mails and two spreadsheets I gave Mark on June 27 and June 28 (see attachments 9-12) and to lesser extent in the series of e-mails that I had circulated since June 3



when it was announced that Mack would become Pequot's new CEO (attachments 1-8).

2) Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. [Not likely: all communications regarding Mack's position at CSFB during the critical period before July 2 were between Mack and Credit Suisse Group Chairman Lukas Mühlemann in Switzerland, except for two meetings with CSFB CFO and a CSFB attorney. The July 30, 2001, Business Week discussed how Mack went to CSFB: "Since April, he [Mühlemann] had been wooing Mack—who left Morgan Stanley on Mar. 21 after losing a power struggle with CEO Philip J. Purcell—to take on one of the toughest jobs on Wall Street." So far, despite my request, CSFB has not produced anything to or from its Swiss parent regarding Mack. When I ask about it, his underlings tell me Lynch is looking into it. Patalino has politely suggested: "Why don't you get it from Mack?" (See attachment 1d) Until we talk to Mack, we don't know who he might have spoken with at CSFB before he was hired. CSFB has expressed reluctance to restore all backup tapes for all employees for the period from April through July 2001 and I have not asked them to do this.

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with him directly about these proposals. Bob told me 1) that these decisions were for Mark to make and 2) it would be an uphill battle because Mack had powerful political connections. Bob also mentioned this concern during a meeting with Mark and me. Bob's comment about Mack's political influence became more real when I learned on June 27 that documents I had subpoenaed from Morgan Stanley were faxed by Mary Jo White (who had never represented anyone in the investigation) directly to Linda Thompson (see attachment 15), before Morgan Stanley produced them in the investigation. On the preceding Friday, June 24, Bob also met privately with Paul about the investigation I was handling. Likewise, Mark and Bob did not invite me to participate in the meeting on June 27 when they discussed Mack's possible testimony. This combination of events suggests to me that the issue whether Mack's testimony would be taken was being handled differently than the same issue for other witnesses in this investigation and different from the same issue in other investigations. Further, I do not believe that treating Mack differently is consistent with the Commission's mission, at least as I understand it.

My comments above deal with one situation that I found very demoralizing. I am preparing a second memo-e-mail addressing other events that will place the above in perspective.

Sender: Aguirre, Gary J.
Subject: Re: Mark's e-mail of July 25
Recipient: Berger, Paul [redacted]
Kreitman, Mark J.
Sent Date: 2005/07/27 17:21:44
Delivered Date: 2005/07/27 17:21:00
Priority: Urgent
Type: Note

Paul and Mark:

This replies to Mark's e-mail of July 25, which in turn replied to mine of June 28 (attachment 13). I wrote and sent my e-mail immediately after a heated discussion with Mark on June 28, memorializing what had transpired. I do not understand why it would take four weeks to respond. I am also copying Paul because the timing of Mark's e-mail suggests it was triggered by my conversation with Paul on the same points late last week. Mark's July 25 e-mail reads:

> **From:** Kreitman, Mark J.
> **Sent:** Monday, July 25, 2005 7:15 PM
> **To:** Aguirre, Gary J.
> **Cc:** Hanson, Robert
> **Subject:** RE: Mack and CSFB subpoenas
>
> I need greater specificity than the information provided here. Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall, is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view. The contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational. The fact that we have not identified other potential tippers is of only marginal significance. Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. The evidence of motive Mark cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. I have clarified the role of Irv and Larry, which should assuage your anxiety to some degree. I have at no time "denied [your] my request to proceed with the CSFB . . . subpoena." To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the sine qua non for focused investigation of Mack.

For ease of reference, I have separated the Mark's comments made in his e-mail of July 25 into sub-points and then respond to each sub-point in the bracketed comments.

1) I need greater specificity than the information provided here [My June 28 e-mail was not intended to specify the factual support for the Mack testimony-CSFB subpoena course of action. It merely confirmed my understanding that Mark had rejected both courses of action during the heated meeting we had a few minutes earlier. The factual support for these two steps was discussed in the two lengthy e-mails and two spreadsheets I gave Mark on June 27 and June 28 (see attachments 9-12) and to lesser extent in the series of e-mails that I had circulated since June 3 when it was announced that Mack would become Pequot's new CEO (attachments 1-8).

2) Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal. [Not likely: all communications regarding Mack's position at CSFB during the critical period before July 2 were between Mack and Credit Suisse Group Chairman Lukas Mühlemann in Switzerland, except for two meetings with CSFB CFO and a CSFB attorney. The July 30, 2001, Business Week discussed how Mack went to CSFB: "Since April, he [Mühlemann] had been wooing Mack--who left Morgan Stanley on Mar. 21 after losing a power struggle with CEO Philip J. Purcell--to take on one of the toughest jobs on Wall Street." So far, despite my request, CSFB has not produced anything to or from its Swiss parent regarding Mack. When I ask about it, his underlings tell me Lynch is looking into it. Patalino has politely suggested: "Why don't you get it from Mack?" (See attachment 14) Until we talk to Mack, we don't know who he might have spoken with at CSFB before he was hired. CSFB has expressed reluctance to restore all backup tapes for all employees for the period from April through July 2001 and I have not asked them to do this.

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Gary J. Aguirre

Senior Counsel

Division of Enforcement

Securities and Exchange Commission

Phone: [redacted]

Fax: [redacted]

mailto: [redacted]

From: Kreitman, Mark J.
Sent: Monday, July 25, 2005 7:15 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert
Subject: RE: Mack and CSFB subpoenas

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From: Aguirre, Gary J.
Sent: Thursday, June 30, 2005 9:29 AM
To: Kreitman, Mark J.
Subject: FW: Mack and CSFB subpoenas

Corrected e-mail sent yesterday

Gary J Aguirre

Senior Counsel

Division of Enforcement

Securities and Exchange Commission

Phone: [redacted]

Fax: [redacted]

mailto: [redacted]

From: Aguirre, Gary J.
Sent: Wednesday, June 29, 2005 5:11 PM
To: Kreitman, Mark J.
Subject: Mack and CSFB subpoenas

Mark:

As you know, I have asked to issue a subpoena to CSFB and to take the testimony of John Mack in connection with Samberg's $80 million trades in GE and Heller shortly before the public announcement of the GE's acquisition of Heller. I suggested in my e-mail to you of June 27 in summary fashion why Mack was a logical source of the tip and also suggested in my memo of June 28 that this was the next logical step in this investigation.

The reasons are the following:

1) Mack had access to this information from two sources, since he had recently left Morgan Stanley, which represented GE, and moved to CSFB, which represented Heller;

2) Mack had communications with Samberg on at least two critical times during the Samberg's trading, including a call after the close on the Friday before the Monday when Mack began trading; we have no other leads at this time of people who likely knew of the acquisition that had contact with Samberg shortly before he began trading;

3) I have questioned Samberg about all individuals who were identified in chronologies who had knowledge before July 2, 2001 of the Heller acquisition, and Samberg denies he had contacts with any of them; this suggests that the tipper was not directly involved in the acquisition;

4) Samberg would likely have a relationship of trust with the person from whom he accepted the information, Mack meets that criteria,

5) There were a number of motives for Mack to pass this information along to Samberg:

   a) Mack was admitted directly into Pequot deals, e.g., the night that Mack is suspected of giving Samberg the tip, Samberg arranged for Mack to get a $5 million piece of a Lucent investment subsidiary that was being sold at a fire sale;

   b) Mack got to put at least $7 million (likely much higher) into Pequot funds that were closed; these funds had sensational returns at that time, including $5 million into one of the funds that was allocated 5.4 million in profits from GE-HF;

   c) Samberg was proposing Mack as a director on two boards;

   d) They were very close friends, e.g., Samberg's secretary says "Mark loves you"; Samberg was in desperate need at that time for some big hits, since his all star protégé was leaving about half of Pequot

employees and Samberg was worried that more would leave;

e) Mack solicited and obtained Samberg's stock tips;

f) Other consideration that does not show up in the Pequot e-mails.

Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation. First, Bob has instructed me to stock with the GE-Heller investigation. The Samberg-Microsoft investigation is on hold until David Anders and the FBI speak with David Zilkha. That matter really depends on whether Zilkha tells the FBI that he tipped Samberg around April 9. If he does, David Anders will likely continue the matter as a criminal investigation. If Zilkha does not admit he tipped Samberg, we would have the same problem.

As I mentioned in my June 28 memo, the second best source of proving the Samberg GE tip is from the backup tapes. I am not permitted to speak with either Pollack or Storch, who are handling this matter and Audrey refers me to them. That effectively closed off this source. The other possibility is to take extensive testimony from Pequot employees in this regard. I have already taken five examinations trying to pin down this issue. Further, taking two weeks of testimony on this issue that may not be productive is not how I interpret Bob's guidelines.

I have proposed that we obtain the documents from CSFB that would show when Mack obtained information about GE-HF. I suspect that Mack learned during an orientation at CSFB. I would be looking for information that Mack knew about GE-Heller as well as information when Mack learned. Evidence that Mack learned near or on Friday June 29, the night of his call to Samberg, would tend to focus the matter more on Mack. Evidence that he did not learn until July 3 or never learned would eliminate him. From the newspaper accounts, I have inferred that there were some arrangements between CSFB [prior draft erroneously referred to Morgan Stanley] and John Mack in early June. This is consistent with an orientation later in the month during which Mack learned about the GE-HF matter, perhaps 10 days to 2 weeks before the public announcement that he was Morgan Stanley's CEO.

I understand you have denied my request to proceed with the CSFB and Mack subpoenas

Gary

Mack 13.doc

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Sent: Wednesday, June 29, 2005 5:11 PM
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Subject: Mack and CSFB subpoenas

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Document Properties

Title:	From: Aguirre, Gary J
Author:	US
Template:	Normal
Last saved by:	US
Revision number:	1
Application:	Microsoft Office Word
Total editing time:	00:00:00
Created:	2005/07/27 06:33:00
Last saved:	2005/07/27 06:33:00
Company:	SEC

Mack 2.doc

From: Aguirre, Gary J.
Sent: Monday, June 06, 2005 11:30 AM
To: Hanson, Robert; Eichner, Jim; Miller, Nancy B ; Foster, Hilton
Cc: Kreitman, Mark J.; Ribelin, Eric
Subject: John Mack correction

Mack left Morgan Stanley in March 01 and was working at CFSB by 7/12/01. He continues to be most likely candidate so far for various reasons: deep connections Heller info at MS, access to Heller info at CSFB, multiple relationships with Samberg in 01(close pals, investor in Pequot, discussed deals, phone call just Samberg began Heller trading, possible office at Pequot, and inch of 2001 e-mails).

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GJA Mack 12.xls

Sheet1

		Samberg-Mack Key E-mails
Date	**Action**	**Description**
2000/12/23	Email JJM to AS	JJM to invest $5 mil, possibly in scoot, telecomm and h/c
2001/02/13	Email JJM to AS	"Should Christy sell her Metagnity stock or keep it?"
2001/02/13	Email AS to JJM	"Larry and I are keeping ours. Big things ahead."
2001/04/11	AS Calendar Item	John Mack uses AJS office @PCNY
2001/04/18	Email AS to Poch	JJM to use NY office for mtg "next Tuesday"
2001/04/26	Email Jennings to AS	"JJM called, will try you at home tomorrow"

2001/05/08	Email JJM to AS	JJM wants to put additional 5mil with PCM
2001/05/09	Email AS to JJM	Asking JJM to put $ into BabyC ("direct investment opp.")
2001/05/11	Email AS to SC	JJM to put "5mm to partners, and $ into scout"
2001/05/17	Email WC to AS	JJM wants to put 1 mil in co buying BabyC (healthtech)
2001/05/19	Email JJM to AS	JJM confirms 1 mil in co buying BabyC
2001/05/28	Email JS to AS	Should JS accept JJM +1 mil (2 mil total) even though surplus?
2001/05/28	Email AS to JS	"I'd definitely take john's money."
2001/05/28	Email AS to JS	"I'd definitely take john's money "
2001/05/28	Email AS to JS	JJM would be "great board member" re BabyC Acq. Co.
2001/05/30	Dinner with J. Mack	Dinner at San Pietro, New York City
2001/05/30	Email AS to Poch, Lenihan	JJM as board member for Freshstart?
2001/06/04	Email AS to JJM	"Freshstart are very interested in you coming aboard"
2001/06/20	AS dinner with JJM, McGinn	JJM hasn't received Freshstart materials yet
2001/06/26	Email D. Bucci to other admins	Earliest email mention of 07/19 JJM lunch re pvp hc
2001/06/29	Email AS to Pock on 6/30	Presumed conversation between JJM and AS
2001/06/30	Email JP to AS	JJM to put $5mil into Freshstart
2001/06/30	Email Poch to AS	"great call with john mack last night "

Sheet2

Sheet3

Document Properties

Author: US
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GJA Mack 11.xls

Sheet1

Mack Pequot Holdings

Fund/Managed Account	Client Name	Current Investor in Fund?
Pequot Credit Opportunities Fund, L.P.	Christy K. Mack	Yes
Pequot Endowment Fund, L.P.	C.J. Mack Foundation	Yes
Pequot Healthcare Fund, L.P.	Christy K. Mack	Yes
Pequot Healthcare Venture Fund, L.P.	John J. Mack	Yes
Pequot Partners Fund, L.P.	John J. Mack	Yes
Pequot Private Equity Fund II, L.P.	Christy K. Mack	Yes
Pequot Private Equity Fund III, L.P.	C.J. Mack Foundation	Yes
Pequot Private Equity Fund III, L.P.	Christy K. Mack	Yes
Pequot Scout Fund, L.P.	Christy K. Mack	Yes
Pequot Special Opportunities Fund, L.P.	John J. Mack	Yes
Pequot Telecommunications and Media Fund, L.P.	Christy K. Mack	No
Pequot Telecommunications and Media Fund, L.P.	John J. Mack	No
Pequot Telecommunications and Media Offshore Fund, Inc.	C.J. Mack Foundation	No
Pequot Venture Partners II, L.P.	John J. Mack	Yes
Pequot Special Opportunities Fund II, L.P.	John J. Mack	Yes

Sheet2

Sheet3

Document Properties
Author: US
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Last printed: 2005/07/27 08:36:36
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Last saved: 2005/07/27 12:15:44
Company: SEC

Mack 1.doc

-----Original Message-----
From: Aguirre, Gary J. [redacted]
To: Ribelin, Eric [redacted]; Foster, Hilton [redacted]; Eichner, Jim [redacted]; Conroy, Thomas [redacted]; Glascoe, Stephen [redacted]; Miller, Nancy B. [redacted]
CC: Hanson, Rob [redacted]; Kreitman, Mark J. [redacted]
Sent: Fri Jun 03 08:36:07 2005
Subject: Possible tipper new Pequot Chairman?

John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. Mack moved from Morgan Stanley, adviser in Heller acquisition, to CSFB, also adviser in Heller, in late July 2001, the month of acquisition. The are hundreds of Pequot e-mails referring to Mack, including a dozen in July 2001. See e-mail below between Samberg and his son referring to Mack ("It's nice to have friends in high places...)" Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets? Please note the happy face which has already come up twice in relating to possible flow of insider info. Ironically, Mack's article quoted below is C-1 of WSJ, just as was when Samberg's exchanged e-mails below.

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Company:	SEC

Mack 6.doc

From: Aguirre, Gary J
Sent: Monday, June 20, 2005 1:41 PM
To: Hanson, Robert
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

See comments below.

From: Hanson, Robert
Sent: Monday, June 20, 2005 12:48 PM
To: Aguirre, Gary J.
Subject: RE: Pequot; Connecting the dots with the CSFB-Mack-Samberg-theory.

Couple more: Mack spoke with Heller? Don't have evidence of this. See 2 below and then 1) below that, if he's taking with Heller doesn't that go a long way to implicating him? Agreed but no evidence. I still don't get 4) below. When was Mack investing in the funds and how much. Don't have any records showing amount of all investments, just the funds he invested in. But here's what we know from e-mails: Mack was an original investor in Pequot (1999) and invested in multiple funds and deals between May and August of 2001, the only time frame I have reviewed carefully. One investment was $5 million. Another was $1 million. I think another was for $5 million. There are references to others where amounts not stated. Also, where was Mack before CSFB? From March through start date with CSFB, Mack between jobs but sometimes used Samberg's office in New York. Mack was with Morgan Stanley until March of 2001. Recent subpoena to MS asked for 1) all Mack (plus assistants') e-mails to PQ before he left in March and 2) all e-mail from MS staff to Mack after he left. Maybe that's where he learned about Heller. True.

Document Properties

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Company:	SEC

Mack 4.doc

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 12:32 PM
To: Hanson, Robert

Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory

See comments answers below

From: Hanson, Robert
Sent: Monday, June 20, 2005 11:16 AM
To: Aguirre, Gary J.
Subject: RE: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Interesting stuff!

Couple questions

1. Are you suggesting that we take Mack's testimony now before we get the documents or that we ask for more documents from CSFB or both? Both If you want more documents from CSFB, what would they be? I need to draft language but I would want to get his contract (when signed? June?) and all documents that relate to his phase in (assuming it occurred in June), particularly any meetings with investment banking staff or any download he got from Wheatly, the CEO that was forced out. Keep in mind that he had confrontations with bankers when he walked in, including Quattrone.
2. How do we know that Mack spoke with Heller on June 29 (1 below)? Samberg e-mail of 6/30 saying he spoke with Mack the night before.
3. When did Samberg start buying Heller (3 below)? July 2, the Monday after Mack call
4. On 5 below, was Mack personally investing in Pequot? Yes; he was an original investor. If so, when and how much? Don't know total, but e-mails in May-August refer to $5 million in one fund, plus more $ for Scout. How would he invest in the hottest deals? Directly, but hard to tell much more because e-mails cryptic and in code. He was investing in "fresh start," "Baby C," and "distressed guys." Fresh start was some kind of spin-off from Lucent. And the hottest funds? During time frame, he put $5 million in one fund and wanted to put more in Scout (suspect he was did) which was on fire.
5. Do you interpret the e-mail quoted in 5 below to mean the minimum investment of $5 million to be waived for important industry contacts? Not sure. Samberg says more than $10,000,000. Did Mack then invest less than $5 million in partners? E-mail was not about Mack; it was communication to Zilkha that shows Samberg's state of mind on July 2, 2001.

Document Properties

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Mack 3.doc

From: Aguirre, Gary J.
Sent: Monday, June 20, 2005 10:14 AM
To: Hanson, Robert
Subject: Pequot: Connecting the dots with the CSFB-Mack-Samberg theory.

I think we should serve a second subpoena on CSFB seeking all documents regarding Mack's phase in with CSFB. Our first subpoena was very narrow, seeking only e-mails to or from Mack and Pequot during June and July 01. A tougher question is whether to take Mack' story now or wait till we get all info from CSFB. I favor doing it now.

As a theory, the CSFB-Mack-Samberg best connects the dots for the path of the GE-HF tip. It has some gaps and uncertainties, but no inherent inconsistencies. *If Mack learned from CSFB about Heller around June 29*, I think the story would be compelling. Here are the dots I see:

0. Samberg's aggressive buying of Heller suggests he received the tip shortly before July 2. Mack spoke with Heller on Friday evening June 29

1. June 29 is also a logical time for Mack to learn about the CSFB's inventory of investment banking deals, including the Heller acquisition, given Mack's July 12 start date with CSFB. My inference, albeit on sketchy evidence, is that Mack committed to CSFB in early June.

2. Samberg's continued buying suggests that he was continuing to receive confirmation the acquisition would go through. Mack would likely have continued to get updates on GE-Heller and he continued to have contacts with Samberg.

3. With over $400 million in Pequot funds, an MIT graduate, and 16 years running hedge funds, Samberg was too rich, too smart and too experienced to take a tip from anyone he would not deeply trust. Mack met this criterion and had as much to lose and Samberg if they got caught.

4. Mack profited from being allowed to get in closed funds and in special Pequot deals. He *was allowed* to pour millions into Pequot's hottest deals and hottest funds in May through August 2001 when Pequot was managing over $15 billion in assets and funds were not accepting new money. As Samberg put it on July 2, the day he began trading in Heller, "the only fund open now is partners, and although the min is $5mm, we are always willing to make significant exceptions for important *industry contacts*."

[Bob: The term "industry contacts" appears more than 2000 times in PQ e-mails]

Incidentally, the above may also help explain Lynch's call to Paul. Incidentally, Lynch advised Mack on at least one Pequot deal. Mack wrote Samberg on 2/6/02 stating, "I have checked with Gary Lynch and he confirmed that there is no conflict for me as an original investor [in Pequot]." Mack also hired Lynch. Here's one newspaper account: "Mack hires include *Gary Lynch*, a former enforcement chief at the Securities and Exchange Commission, who is a vice chairman in charge of stock research and legal compliance, and Stephen Volk, 68, a former managing partner at law firm Shearman & Sterling, who was Mack's first hire and became chairman of CSFB."

Incidentally, Volk resigned from Shearman & Sterling in early June, suggesting that the Mack-CSFB deal was in place by then, which in turn means June 29 is a possibility when Mack learned about GE-Heller.

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[redacted]

Mack 5.doc

From: Hanson, Robert
Sent: Monday, June 20, 2005 8:25 PM
To: Aguirre, Gary J.
Subject: Re: Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory.

Okay Gary you've given me the bug. I'm starting to think about the case during my non work hours.

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Company: SEC

[redacted]

Mack 8.doc

From: Aguirre, Gary J.
Sent: Friday, June 24, 2005 8:19 AM
To: Henson, Robert
Subject: Broadening CSFB subpoena for Mack e-mails

Attached is Nancy's Samberg-Mack spreadsheet with a few edits.

CFSB has 500,000 Mack e-mails now ready to be searched. Production date, after extension, is now 7/8. Our current subpoena seeks:

0. All electronic mail to John J Mack ("Mack"), from June 1, 2001, through July 31, 2004, from any agent, officer or employee of Pequot Capital Management ("PCM");

~~1. All electronic mail from Mack, from June 1, 2001, through July 31, 2004, to any agent, officer or employee of Pequot Capital Management ("PCM").~~

Should we discuss broader search with them now to avoid repetitive searches? Also, I have found e-mail address Mack used just before he joined CSFB, which means we may want CSFB e-mails to and from this Mack address. **[GJA Second request to Bob to Broaden CSFB subpoena]**

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Last saved:	2005/07/27 06:31:00
Company:	SEC

Mack 7.doc

From: Hanson, Robert
Sent: Wednesday, June 22, 2005 8:31 AM
To: Aguirre, Gary J.
Subject: RE: Good question yesterday

Good – that helps.

From: Aguirre, Gary J.
Sent: Wednesday, June 22, 2005 6:04 AM
To: Hanson, Robert
Subject: Good question yesterday

I missed this: Mack got $5mm in Pequot Partners on either 6/1/2001 or 7/1/2001, either a month before or the day. Samberg started buying HF and GE (see e-mails between Samberg and Pequot Marketing head below). Samberg put one third of GE and HF in Partners.

TO:
Clancy, Sheila [Pequot Marketing Head]
FROM:
Samberg, Art
DATE = 05/13/2001

he'd like to come in asap. are we going to open on 6/1?

---Original Message---
From: Clancy, Sheila
Sent: Sunday, May 13, 2001 9:23 PM
To: *Samberg*, Art
Subject: RE:

sure i will call him and i will ask mark about scout... do you want him to come in on 6/1 or 7/1? mark... what do you think?

---Original Message---
From: *Samberg*, Art
Sent: Friday, May 11, 2001 2:31 PM
To: Clancy, Sheila [Pequot Marketing Head]

john *mack* would like to put $*5mm* into partners at the 1st available opening. he'd also like to put more $ into scout, if that's possible, and would like a recap of what he has where. you want to call him?

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Company: SEC

Mack 10.doc

From: Aguirre, Gary J.
Sent: Tuesday, June 28, 2005 5:46 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Rabelin, Eric
Subject: GE-Heller: Obstacles and proposed next steps

This memo summarizes the proposed steps for advancing the investigation of the GE-HF investigation. I have other thoughts regarding how we might advance the investigation of other SRO referrals (e.g., Elite Information and Blue Coat Systems) as well as the efficient identification of other insider trading activity.

I assume you have reviewed memo 1 which summarizes Samberg's testimony on why he traded in HF and GE. His explanation of his HF trading lacks credibility and he has none on GE. Still, we need to establish the likely path through which the material nonpublic information (MNI) flowed to Samberg. Proposed below are five avenues for establishing that path.

0. Documents-Testimony from the five investment bankers (CSFB, Morgan Stanley, JP Morgan, Lehman and Merrill Lynch) or the two principals (GE and HF).

I discuss these possible tip sources in ascending order, given what we know now, of probability.

The least likely sources *at this point* are Heller, Merrill Lynch, and Lehman. We have no evidence of any Samberg-HF contacts. Samberg denied having any contacts with HF. He could not identify any of the HF employees involved in the acquisition. Merrill was consulted by Fuji Bank very early, was not hired, and was not heard from again. Yesterday, Merrill produced documents pursuant to our subpoena on a CD which I will review when they have been posted to Iconnect. Hence, its status could change if something shows up. Samberg did testify that he might have spoken with someone from Merrill. Also, there were a huge amount of hard and soft dollar commissions that went to Merrill from July 1, 2001, through June 30, 2002 (approximately $16 million). The chronologies indicate that Lehman, which had investment banking ties with Heller, did not become involved until just before the announcement of the acquisition in late July 2001. I have not as yet served a subpoena on Lehman.

JP Morgan is up on notch as a source of a tip. It consulted with Fuji from beginning to end. However, Samberg testified he knew no one on the JP Morgan acquisition team. JP Morgan's counsel wrote that there were no e-mails between Morgan's and Pequot. Additionally, Samberg

testified that he does not recall anyone having any contacts with anyone from JP Morgan in 2001. In short, we have no leads.

Up another notch as a tip source is GE. Samberg knows two members of the GE acquisition team, John Myers and Kenneth Langone. Langone was an outside director and there are few e-mails between him and Samberg in 2001. One e-mail suggests that Langone and Samberg met in January 2001. Samberg testified he was not certain he knew Langone in 2001. However, his testimony regarding Langone was a little suspicious (RT II p. 28, l. 20-p. 31 l. 14). Samberg has a much stronger relationship with John Myers, CEO of GE Asset Management. It dates back to the late nineties. He attends basketball games with Myers. When I asked Samberg if he ever discussed GE business with Myers in these games he responded, "What do you mean by discuss 'GE businesses?'" However, GE's chronology indicates that both Myers and Langone did not learn about the HF acquisition until just before it was announced. However, there is no accuracy warranty with the chronos; Chrysakos—the GE VP that went to prison as a tipster on GE-HF—was not even mentioned in the GE chronology to the NYSE. I have asked GE, represented by Wilmer-Cutler, to submit a more complete chrono in view of the Chrysakos omission.

The second highest probability of the tip would be Morgan Stanley (MS), which consulted with GE, for two reasons. First, MS is Pequot's prime broker. Samberg rattled off about ten names of higher echelon MS people he knew in 2001, though he denied knowing any of the individuals on the acquisition team that consulted with GE. More importantly, there is the Mack connection. The rub is that Mack left MS in March or April 2001, before MS knew about GE-HF. However, Mack came from the institutional side of MS and had been expected by the media to bring many of its bankers with him to CSFB, implying the depth of his relationships with MS bankers that might have known about GE-HF. It later became public that there was a contractual prohibition in Mack's severance agreement precluding him from hiring away MS staff. Yesterday, we received a packet of Samberg-MS e-mails from MS for the period before Mack left MS. The more interesting e-mails would be those after he left and after MS learned about GE, which have not as yet arrived. I doubt we will find anything like a tip, but we find him being chummy with somebody who knew about GE-HF.

The top spot goes to CSFB, which consulted with HF, for reasons you know. This could of course change if it turned out that Mack had no significant contacts at CSFB until after July 2. As you know, we have subpoenaed communications between Mack and Pequot from June 1, 2001, until June 2004, when he left CSFB. My view is that we should broaden the subpoena to obtain (1) all communications between Mack (we now have his e-mail address just before he started with CSFB) and CSFB for the two months before he began with CSFB and (2) all documents relating to his phase in as CEO at CSFB generated during June and July 2001. Further, I think we need to take Mack's testimony and simply nail down whether he will admit that he knew about the GE/HF acquisition from any source. Obviously, he could have learned this at either CSFB or MS. Since the GE-HF info could have been communicated to him in the regular course of business from CSFB, and thus third parties would be innocently involved, he might actually tell us if this occurred. If this was the tip path, the question would be when: the closer to June 29 or the morning of July 2, the stronger the case that he was the tipster. As discussed in my first memo, please keep in mind that Samberg was a heavy purchaser of HF on July 2 and tried to buy more than twice the amount he actually executed. I have asked Tom Conroy to get BOA Montgomery's trading tickets for July 2 so we can determine whether the trade was put in at the opening or during the day. If it was put in during the day, the tip could have come on the morning of July 2. If by any chance that is when Mack learned of the acquisition, he would look very much like the tipster.

It is also important whether Mack had his GE/HF information refreshed during July 2001. On July 9, Samberg, for some reason, only tried to buy 15,000 shares of HF. The next day, he directed

his trader to purchase 455,300 shares of HF. What did he learn between his July 9 order and his July 10 order? Did Mack have his information refreshed at this time?

In short, the broadened subpoena and Mack's testimony could (1) point to Mack as the tipster or (2) eliminate Mack as the tipster and thus suggest we eliminate CSFB and look closer at the other candidates.

1. Production of additional e-mails.

A second possible source of evidence indicating the tipster for GE/HF is the yet un-produced e-mails of Pequot. There are two possibilities. First, Pequot is holding an now unknown number of e-mails and instant messages for privilege review. Fried Frank has represented that there are no e-mails to or from Samberg for the period of April 15, 2001, through July 31, 2001, among the withheld e-mails and IMs. I do note that there are several e-mails to and from Pequot's General Counsel at the critical time relating to "investment decisions."

A second possible source, and probably the only realistic one for GE/HF, is the backup tapes. There are four classes: the Andor tapes, the missing tapes, the damaged tapes, and the non-exchange server tapes. Irvine Pollock and Larry Storch have been hired for the task of ascertaining what happened to the missing tapes, locating any other non-exchange server tapes with e-mails, and retrieving any e-mails from the damaged tapes. I see Pollack-Storch as PCM's protective wall of integrity around the tapes. Shame on anyone who suggests Pollack-Storch is not getting to the bottom of backup tape bronhaha. As you know, I have written Audrey Strauss regarding the newly discovered non-exchange server tapes and got a reply form Larry Storch, which did not respond to my questions, e.g., which Pequot employee had possession of the recently discovered non-exchange server tape from which e-mails were retrieved. I think Audrey has the best of all worlds right now regarding these three categories of tapes: the Pollock-Storch wall of integrity and my inability to press them for answers to pertinent questions. Mark's call last week to Fried Frank may get Pollack-Storch to concede they simply represent Pequot.

The circumstances involving the backup tapes may be an obstruction of justice case. How and when did some of the tapes get damaged? How did some get lost? If I have to take this on without some guidance, it is a very big job.

That leaves us with the Andor tapes. I understand that Audrey will send me a response next week to my request from legal authorities supporting Pequot's assertion of privilege.

2. Peter Dartley.

So far, outside of Samberg, Pequot e-mails/documents indicate only one other Pequot employee knew anything about the GE/HF trades, Peter Dartley. On July 11, 2001, Samberg wrote Dartley, "Where are we on HF?" Dartley was Samberg's chief trader in July 2001. Samberg dealt directly with him and often gave him directions to make trades. The quote above suggests that this was done on HF. Dartley posted the HF trades and the GE trades to the handwritten Pequot trade blotter.

Dartley was also an intermediary when Samberg needed information about engaging in an arbitrage transaction on GE-HF after the announcement of the acquisition but before the close. Other e-mails suggest that Dartley was Samberg's confidante on investment decisions and other matters.

Pequot's employment list indicates that Dartley started work with Pequot in 1994 and never

left. This is not accurate. The Chief Trader at MS told me that Dartley left (I think retired from) Pequot and later rejoined Pequot some time in 2003 in his current position as a "Managing Director." His new assignment was to restructure Pequot, an assignment that says volumes about Samberg's trust in Dartley. If any incriminating e-mails exist, I suspect they would be between Samberg and Dartley.

I think we should issue a subpoena for all e-mails to and from Dartley from January 1, 2001, to the present, as we have with 34 other Pequot employees. He should also go to the top of the testimony list.

3. The emerging mosaic of Samberg's activities during June and July 2001

As you know, Nancy has been working on an Excel spreadsheet that includes key e-mails to and from Samberg, including those to/from or mentioning Mack. It also contains trading info and info from the GE-HF chronologies. Relevant data from phone records and credit cards will be entered as it arrives. This mosaic, especially with input from CSFB or MS regarding Mack, could become a clearer and clearer picture of the path of the tip.

4. Calls to former Pequot employees

2001 was a turbulent year at Pequot. Many people left with Dan Benton to form Andor. Others simply left. Some appear to have been fired. Eric and I have frequently discussed questioning former Pequot employees. Of course, the closer they were to Samberg in June or July 2001, the better. One obvious candidate is Wendy Chicosky Samberg's secretary in June and July of 2001. She left in mid-October 2001, which means she could have gone to Andor. Among other things, she kept his daily calendar. There is a dilemma here: if we call former Pequot employees, they may not talk because of the confidentiality agreements they signed; if we take their testimony, they may get "lawyered up" by Fried Frank selections before they testify.

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Company:	SEC

Mack 9.doc

From: Aguirre, Gary J.
Sent: Monday, June 27, 2005 7:42 AM
To: Hanson, Robert
Cc: Kretman, Mark J.; Riblin, Eric
Subject: Samberg's trading in HF and GE:

This memo summarizes the evidence, *especially Samberg's own testimony*, suggesting that he acted on confidential information in making his trading decisions on GE and HF. This memo supplements but does not repeat the information contained in the Excel spreadsheet that chronicles the events leading up to the public announcement of the GE-HF acquisition.

A) Samberg's wanted to buy more HF and short more GE

On July 30, 2001, General Electric announced its acquisition of Heller Financial ("HF") at approximately a 50 per cent premium to its last trading price. From July 2 through July 27, 2001, Samberg purchased 1,148,200 shares of Heller for a purchase price of $43,839,784.43. His profit on HF, according to PCM records, was $16,939, 578.52.

Samberg wanted to buy significantly larger blocks of HF during July 2001, particularly during the week before the public announcement. On July 2, the first day he directed in PCM, he directed the purchase 223,700 shares; only 100,000 shares were filled. The total trading volume on that day was 388,900 shares. On July 10, 2001, Samberg directed his PCM trader to purchase 455,300 shares; only 100,000 shares were filled; trading volume was 375,600 shares. On July 11, Samberg's order was for 336,500 shares; only 56,500 shares were filled; volume that day was 158,200 shares. During the week of July 23, 2001, the week before the public announcement, Samberg directed his traders to purchase 480,400 on Monday, 418,500 on Tuesday, 373,000 shares on Wednesday, 302,900 shares on Thursday, and 243,900 on Friday. His trader purchased only 10,000 on Monday, 18,500 on Tuesday, 10,000 on Wednesday, 20,000 on Thursday, and 10,000 shares on Friday. On July 30, 2001, the day of the announcement, Samberg had a standing order to purchase 233,500 shares. Later that day, after the announcement, he sold his entire holdings of 1,148,200 shares.

Likewise, Samberg engaged in heavy short sales of GE beginning on July 25, five days before the public announcement of the acquisition. On July 25, he directed his trader to short sell 766,600 shares of GE. It was fully executed. On July 26, he directed his trader to short sell an addition 385, 200 shares of GE; only 50,000 were executed. On July 27, Samberg instructed his trader to short sell an additional 385,500 shares of GE; only 20,000 were executed.

The point is this: Samberg risked $80,000,000 of PCM assets belonging to sophisticated institutional investors. He wanted to risk much more. This suggests that he had extraordinary confidence in PCM's research in GE and HF or that for some other reason he believed HF's price would go up and GE's would fall. This memo next takes a look at PCM's research on both sides Samberg's GE-HF bet.

B) Samberg's explanation why he bought Heller Financial (HF) is not credible.

0. Samberg regurgitated information during his testimony why he purchased HF that was spoon fed him by his attorneys.

0. Samberg identifies six reasons he purchased HF's stock: (1) credit climate that existed in 2001 was favorable for HF; (2) HF's strong financial model; (3) speculation that HF would be involved in a consolidation; (4) analysts' reports described the attractiveness of the HF franchise; (5) the relative performance of HF vs. other financial stocks; and (6) analysts' reports that HF was growing at ten percent and was projected to continue that growth (RT II, p. 67, l. 2 – p. 69, l. 22).

1. Each data point was described in the materials shown to Samberg by his counsel shortly before he testified (RT II, p. 75, ll. 25 – p. 80, l. 19).[1]

2. Five of the six items above were contained in Legg Mason report that Samberg did not see *until months after he purchased HF.*

3. Samberg claims he saw an analysts report in July 2001 like the one his attorneys showed him. PCM has produced no such report. No is there a hint of one in the PCM production. Here's Samberg's testimony on the report shown to him by his attorneys:

Q. Have you seen this report in any e-mail dated before July 30, 2001?
A. I don't recall seeing it.
Q. Do you have a high regard for sell side analysts?
A. I have a high regard for them as people. I don't have a high regard for using their reports to make investment decisions.
Q. It would have been very unusual for you to rely on a sell side report, would it not, in making an investment decision?
A. Historically, that is true.
Q. In fact, isn't it true, sir, that you don't think they're worth a damn?
A. In general, I don't think their reports are worth a damn. The people can be, but not the reports.
Q. Right. And you've made that statement publicly, have you not?
A. I have.
Q. So this is – Exhibit 19A is sell side research, is it not, sir?
A. Sure is.
Q. Exactly what you said isn't worth a damn. Correct?
A. You bet.
Q. So is it fair to say that the research you saw in July 2001 about Heller Financial also wasn't worth a damn?
A. I really don't know what I saw.

1. Samberg consulted with no one, contrary to PCM practices, before and during his trading in HF.

0. Samberg did not communicate with anyone at PCM before buying HF, (RT I, p. 70-71).
1. No one assisted Samberg in making the HF trading decisions in July 2001. Samberg made a decision not to seek the help of any of the 250 people who worked at PCM in connection with his decision to buy HF (RT I p.113, ll. 16-23).
2. Samberg can recall no discussions with anyone at PCM regarding his decision to purchase HF (RT I, p. 71, p. 81, l. 9-15).
3. Samberg has no recollection of speaking with anyone employed with HF before making the decision to purchase HF (RT I, p. 71).
4. Samberg can recall no discussions with any financial services firms or brokerage firms or consultants before making his decision to invest in HF (RT I, p. 81, l. 22 – p. 83, l. 4).
5. Samberg does not recall speaking to any analyst about HF when he was purchasing the stock (RT II, p. 55, l. 23 p. 56, l. 6).
6. Samberg does not recall speaking with anyone about HF before or during the period the period he purchased it (RT II, p. 56, l. 14-17).
7. All the above is inconsistent with patterns apparent in PCM documents relating to trading

decisions on other stocks. [See PCM "due diligence" section below.]

2. No PCM documents were generated when Samberg purchased HF except trade blotter.
   0. Samberg maintained no hard copy or electronic files relating to his decision to buy HF (RT I p. 69 ll. 11-14).
   1. No one prepared any files regarding Samberg's decision to trade in HF (RT I, p. 79, l. 24 - p. 80, l. 4).
   2. Samberg could not identify any analyst report that he claims to have read before his decision to buy HF in July 2001 (RT I p. 70, ll.18-22) [Hard to understand why Samberg would consider any analyst report because, according to him, "analysts' reports aren't worth a dam."].
   3. Samberg also testified at the second session that he does not recall seeing any analyst report before or during the time he was purchasing HF's stock (RT II, p. 56, l. 7-13).
   4. PCM produced only two documents relating to Samberg's decision to purchase HF stock. One is an e-mail dated July 11, 2001, from Samberg to his chief trader which states "where are we on HF?" The second is also an e-mail sent from Samberg after the July 30 announcement of the acquisition. It contains only the following symbols: :) :) :) :) :) :) Samberg can recall no other e-mails (RT I p. 108 ll. 23-25).
   5. Samberg has no recollection of seeing any newspaper articles about HF before buying the stock (RT I, p. 72).
   6. All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. [Also, see PCM "due diligence" section below.]

3. Samberg did no home work on HF before purchasing $44 million of its stock.
   0. Samberg did not closely follow HF "in the way people follow stocks before it was purchased" (RT I, p. 72).
   1. Samberg had "no recollection specifically of how I started the Heller investment other than to know that I had been doing this for many years and recognized these opportunities when they come up" (RT I, p. 74).
   2. Samberg's decision to purchase HF in July 2001 had "nothing to do with Heller (RT I, p. 74-75)." Rather, "it was everything to do with the charge I had, which was to manage an important piece of money for clients" (RT I, p. 75).
   3. All the above is inconsistent with patterns apparent in PCM documents relating to trading decisions on other stocks. Also, see PCM "due diligence" section below.

4. HF was not in an industry that Pequot covered in 2001.
   0. PCM and its Core Group, which Samberg managed, focused on technology, media, telecom and healthcare in July 2001(RT I, p. 59-60).
   1. HF was in the "financial services industry" (RT I, p. 75-76).
   2. Samberg could not recall purchasing securities in this industry before July 2001 (RT I, p. 76, ll. 12-18).
   3. PCM had no one who specialized in financial stocks when Samberg bought HF (RT I, p. 75-76).

C) Samberg could offer no explanation why he began a $36 million short of GE stock five days before the public announcement GE was buying HF.

Here's the transcript:

1 Q Now, two months later, almost two months later,
2 there is a short by you, sir, on July 25, 2001 in the amount

3 of 756,000 shares or just shy of $33 million.

4 Do you see that, sir? [I was showing Samberg GE trade blotter].
5 A I do.

6 Q Now, can you tell us the reasons that you felt that
7 GE should be shorted at that particular time?

8 A No, I can't.

9 Q Do you recall whether you were relying on technical
10 analysis or fundamental analysis?

11 A I can't remember anything about the trade.

12 Q Now, I notice that that was the largest trade made
13 in GE except for the sale -- or, excuse me, the -- well, that
14 was the largest trade in GE up until that point in time.

15 A There was a larger one in August.

16 Q Right. That's when it was covered, sir. I said up
17 until that point in time.

18 A Okay.

19 Q You have no understanding at this point why you
20 made that trade?

21 A No.

22 Q Do you know why you made it just --

23 A Do you know how many trades I made that year?

24 Q Do you know why you made it five days before the
25 public announcement on Heller Financial?

1 A No idea.

2 Q The next day, I notice the -- excuse me, two days
3 later, on July 27th, you shorted another 34,000 shares of GE.

4 Correct, sir?

5 A That appears to be the case.

6 Q Do you know why you shorted it on that date?

7 A No.

Q Do you have any recollection whatsoever?

A Nope.

Q Have you attempted to ascertain from any records what caused you to trade –

A Well, first I have to realize that I did do it. So no, I made no ascertations.

Q Now, do you have any explanation why you had $80 million invested in GE and Heller Financial a few days before a public announcement of the –

A $80 million in what?

Q You had 44 million in Heller Financial. You had 36 million in GE.

A You're linking the two. I'm not willing to do that. That's – I don't understand that at all.

Q Thank you. So they weren't linked in your mind?

A They were or were not?

Q They were not linked in your mind at that time?

A No.

[Samberg's above testimony that his GE and HF trades were not related is inconsistent with his testimony (see below) that he bought because there was speculation of a merger. Since he is lying, it's hard for him to keep his story straight.]

D) Samberg's $80 million trades in HF and GE cannot be reconciled with his description of PCM's due diligence procedures in 2001 for making such trading decisions.

Samberg's testimony below follows his identification of a pamphlet delivered to PCM investors describing PCM's "due diligence" procedures in making trading and investment decisions. Samberg's decision to buy HF without consulting with any of PCM's 250 employees, without speaking at HF, without following HF, and without researching HF cannot be reconciled with PCM's customary "due diligence" before making such decisions. Two points: he didn't need to do a "due diligence" because he had the info, he violated PCM's practices or he's lying about how he made the decision.

Q And in the first sentence, it says, "This due

diligence package was created by Pequot Capital Management,

Inc. for current and prospective investors and their

immediate affiliates."

Is that correct, sir?

A. Yes.

Q. Now I'd like to ask you to turn over to page 8,

PCM-081626. And under Roman numeral V. "Investment Style and

Strategy." I'd like you to focus on item 1. And I'm going to

read it, the first sentence, and I'm going to ask you if it's

a true statement.

"Describe the development of your investment

approach and how investment ideas are generated." So this

is -- the statement follows. "Pequot Capital's investment

process begins with an intensive research of a company's

underlying fundamentals."

Is that a correct statement, sir?

A. Yes.

Q. Was that correct in 2001?

A. Yes.

Q. "Investment ideas are generated as a result of

meetings directly with company senior management teams."

Is that a correct statement?

A. Uh-huh. Yes.

Q. Is that correct in 2001?

A. Yes.

Q. "This allows the investment team to understand a

company's management structure, thought process, strategic

direction, and products."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes, it was.

Q "In-depth meetings and industry research provides the research to prospective fund's analysts with an overview of a particular industry as well as the individual company and allows for comparisons to be made within that specific industry."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes.

Q "The investment staff visits thousands of companies each year, conducts extensive interviews with management as well as competitors, suppliers, distributors, and customers."

Is that a correct statement?

A Yes.

Q Was it a correct statement in 2001?

A Yes.

Q "Based on research, the investment analyst is able to formulate business models and discuss their ideas with other members of the investment staff and the respective fund's portfolio manager prior to a position being included within the portfolio."

13 Is that a correct statement, sir?
14 A Yes, it is.
15 Q Was it a correct statement in 2001?
16 A Yes, it was.
17 Q "The portfolio manager makes the ultimate decision
18 as to whether or not a position will be added to the
19 portfolio."
20 Is that a correct statement?
21 A Yes.
22 Q Was it a correct statement in 2001?
23 A Yes, it was.
24 Q "The investment approach is consistent across all
25 funds managed by Pequot Capital."
1 Is that a correct statement?
2 A Yes, it is.
1 Is that a correct statement?
2 A Yes, it is.
3 Q Was it a correct statement in 2001?
4 A Yes, it is.

E) What does Zilkha-MSFT tell us about Samberg?

As you know, however, there is a missing link in GE/HF: If Samberg traded on material nonpublic information (MNI), where did it come from? There are no e-mails to or from Samberg referring to any contacts with GE, HF, or any of the investment bankers involved in the acquisition. The Samberg-Zilkha e-mails show how Samberg operates. They again and again show Samberg using Zilkha to get MNI from Microsoft. One shows Samberg asking Zilkha "those [MSFT] contacts have any views on the direct tv – Murdoch –rumored msft possible deal?" This does not prove the GE-HF case, but does it suggest why Samberg's explanation makes no sense on HF and why he has none on GE? Beyond a reasonable doubt on GE-HF? Not yet. Meet the preponderance of the evidence burden? I'll get back to you after Samberg testifies on Zilkha. I have also asked Nancy to do an Excel spreadsheet on the Samberg-Zilkha-MSFT trades.

F) Was John Mack the tipster?

You have the Excel spreadsheet. I will get the revised, edited version to you by tomorrow. In summary, Mack likely had the GE-HF info sources, he had contacts with Samberg during the period, there was *quid pro quo*, mutual trust existed, and Samberg needed a huge favor. Samberg's need for a big favor is a new idea. His company was splitting a part. Benton was a younger and brighter light. Benton's performance was demonstrably superior to Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him. . .

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and *I did things in a manner that was expedient at the time given my expertise in this area.*

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. *Times were fragile.* I needed their approval to do whatever I wanted to do *or they might walk*. So I wanted them to meet anybody that I was interested in talking to to building out the platform.

[1] When it was established that Samberg was spoon-fed information by his attorneys as reasons he purchased HF, he attempted to create fussy new reasons for his trading decisions. (RT II, p. 81, ll. 2-25).

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Total editing time: 00:00:00

Created: 2005/07/27 06:31:00
Last saved: 2005/07/27 06:31:00
Company: SEC

Mack 14.doc

From: Aguirre, Gary J.
Sent: Monday, July 11, 2005 8:46 AM
To: Hanson, Robert
Subject: CSFB subpoena

Spoke with Pat Patino late Friday re CSFB subpoena. He remains cooperative, but, as we expected, was not sure CSFB will be able to obtain Mack-CS communications. Locating who Mack met with at CSFB will also be a challenge. His comment to me: "Why don't you get this stuff from Mack?" I am going to contact CS USA and subpoena Mack-CS communications. OK?

He asked if I would provide him with a copy of CSFB's NYSE submittal so he would not have to chase it down. With your approval, I provided Morgan Stanley with its submittal. I suggest we do the same with CSFB, since will likely point them in the right direction. OK?

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Application: Microsoft Office Word
Total editing time: 00 01:00
Created: 2005/07/27 18:26:00
Last saved: 2005/07/27 18:27:00
Company: SEC

Mack 15.doc

From: Aguirre, Gary J.
Sent: Wednesday, June 29, 2005 5:13 PM
To: Kreitman, Mark J.
Subject: Morgan Stanley delivery

I have been informed by Fiona Phillips, who represents Morgan Stanley, that a CD is expected here this afternoon. When I told them that it could be delivered tomorrow, since the mailroom would be closed, she insisted that it be delivered today because "someone here was expecting it." That person is not me. I also understand that other documents from Morgan Stanley were sent directly to Linda Thompson and that there have been discussions between senior staff and counsel for Morgan Stanley. As I have told Bob, and stated in my memos, the most logical path of the information is from CSEB to Mack to Samborg.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
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Document Properties

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Last saved:	2005/07/27 21:02:00
Company:	SEC

[redacted]

Andrews, Kelly J.

From: Hanson, Robert
Sent: Monday, October 17, 2005 11:57 AM
To: Andrews, Kelly J.
Subject: aguirre e-mail

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 10:21 AM
To: Hanson, Robert
Subject: RE: Ferdinand Pecora

I am coming in to do the memo now. I will take off Monday instead.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

From: Hanson, Robert
Sent: Thursday, August 04, 2005 10:16 AM
To: Aguirre, Gary J.
Subject: RE: Ferdinand Pecora

Gary,

We seem to be miscommunicating and I'm not sure why. We both have the same objectives. I learned through the grapevine, rather than directly, that you were not leaving but staying and wanted to know what your plans are. I still am not sure because we covered different issues last night and never got to the heart of the question. I inquired because I need to figure out how to staff the case and the like. Your status is obviously very important to figuring out what to do and how to staff the case.

I think we should prepare a memo discussing why it is appropriate to take Mack's testimony at this point. I said I would do it at one point and I thought you said you would do it shortly thereafter. We've discussed this several times thereafter and Paul mentioned recently that he was still looking for a memo. We may have different recollections, but at bottom I still believe one should be prepared. I'm happy to do the memo, though it will have to wait now until after my vacation.

I believe that Mark feels it is premature to take Mack's testimony. I don't disagree. I thought and think it makes sense to write a memo to make sure everyone has a chance to understand the facts we have and whether it makes sense to take the testimony at this juncture. Paul had wanted to talk about taking the testimony at one point. I think the memo should precede such discussion. As a general matter I try to alert folk above me about significant delopments in investigations that may trigger calls and the like so that they are not caught flat footed. I also think that Paul and possibly Linda would want to know if and when we are planning to take Mack's testimony so that they can anticipate the response, which may include press calls, that will likely follow. Mack's counsel will have "juice" as I described last night -- meaning that they may reach out to Paul and Linda (and possibly others). Hope this clarifies things somewhat.

Thanks,

Bob

PS I do not believe in micromanagement or feel it is necessary.

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 9:48 AM
To: Hanson, Robert
Subject: RE: Ferdinand Pecora

Bob:

I do not believe you have accurately characterized our discussion last night nor do I have any recollection of you request for an e-mail a month ago.

I came to your office last night to discuss Pequot because, as I told you, I realized we would not be seeing each other for the next month. Before we got into that discussion, you told me that you had heard I was staying with the Commission and asked that I tell you about my plans.

I then told you that the "micromanagement" of my work had nothing to do with the reason I was leaving the Commission. I did not "grumble" about micromanagement. To the contrary, I told you that I was aware when I accepted the staff attorney position that micromanagement came with the job and that I had fully accepted this as part of the way things are done here, and I understand why you and others believe that is necessary.

I then told you there were two reasons that have collectively triggered my decision to leave. I told you that Mark was not listening to the rationales for the steps I had proposed in the Pequot investigation, that this represented a major shift that occurred overnight in our relationship, that we had an excellent relationship before, that I believe other people at the Commission were involved in Mark's sudden shift, and that the shift was ultimately traceable to the fact that I had filed an EEO claim that had not been dismissed after I accepted employment. I also told you some of the reasons I believed this, i.e., what I had been told by reliable sources how my complaint was viewed by higher levels within the Division, e.g., including a statement that "I would get mountains...hills out of my way if I dismissed the case." I told you I had decided to handle this problem in a different way than resigning and have in fact done so.

Second, I told you that the decision not to take Mack's testimony because of his powerful political connections was the event that triggered my decision, when added to the first problem above. We then discussed at some length what standard had to be met to take Mack's testimony. You told me that Mack was "an industry captain," that he had powerful contacts, that Mary Jo White, Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call Linda about the examination. I told you I did not believe we should set a higher standard for a political captain than anyone else.

Turning to the statement that you had requested a memo a month ago, I do not recall any such request. I will be specific about what I do recall. Late in the week of June 20, you told me *you* were going to prepare memo to Paul Berger regarding Pequot. That followed a series of e-mails between us that same week. You also mentioned, as you did last night, that Mack's testimony would be difficult because Mack had powerful political connections. For that reason, the political hurdle, I spent a big chunk of my weekend preparing two lengthy memos that described in detail the facts relating to Samberg's trading in

HF and GE, which suggested elements of the tipper's profile, and a second memo describing all possible avenues for establishing the identity of the tipper, proposing that Mack was the most likely candidate, and suggesting that we focus on him to eliminate him or establish it was in fact him. Those e-mails were prepared for you and Mark and assumed some knowledge of the investigation. I also thought they might assist you in preparing your memo to Paul. I had no expectation they would be sent to Paul. I also had copies sent to Mark and, at his request, two spreadsheets summarizing e-mails relating to Mack's motivations and list of the funds he had invested in. I do not recall a request by you or anyone else for any other memo. I had hoped that these two memos, with citations and quotes to the evidence, would at least prompt a discussion. You and Mark discussed the memos and then Mark called me with a question that demonstrated that my memos had either been rejected or bypassed. In mid-July, I spoke with Paul about my continuing concern about Pequot. Mark asked that I provide him with a memo of the factors that might have motivated Mack to tip Samberg on HF. Since this subject was addressed in the two memos and two spreadsheets that I delivered to Mark on June 27 and June 28, he obviously wanted something more. I had just begun to take "Official Time" and thought this request was not urgent. About a week later, on July 25, I received an e-mail from Mark that responded to my e-mail of June 28, four weeks earlier. It raised new questions about Mack. I responded in detail to Mark's emails issue by issue last Friday.

I don't know of any request from you or Mark for any memos relating to Pequot over the past six weeks.

Gary

From: Hanson, Robert
Sent: Thursday, August 04, 2005 7:38 AM
To: Aguirre, Gary J.
Subject: RE: Ferdinand Pecora

Gary,

The constant back and forth on these issues consumes a lot of time. I suggested that you write a concise memo on the issue of taking Mack's testimony more than a month ago. That way people can see your proposal, meet on it and comment on it. It's a natural thing that Paul and perhaps Linda would want to know about. At this point, I'm still waiting for the memo (as is Paul I believe), though I understand from talking with you last night that you have given Mark and Paul some materials that I haven't seen. People here are smart, hard working and want to do the right thing. I'm making suggestions to you that you either ignore or don't like and grumble about (the mircomanagement comment last night) – but my experiences here shows that they work. I hope you give that some consideration

Gary J. Aguirre
Senior Counsel
Division of Enforcement
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Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

From: Hanson, Robert
Sent: Thursday, August 04, 2005 7:38 AM
To: Aguirre, Gary J.
Subject: RE: Ferdinand Pecora

Gary,

The constant back and forth on these issues consumes a lot of time. I suggested that you write a concise memo on the issue of taking Mack's testimony more than a month ago. That way people can see your proposal, meet on it and comment on it. It's a natural thing that Paul and perhaps Linda would want to know about. At this point, I'm still waiting for the memo (as is Paul I believe), though I understand from talking with you last night that you have given Mark and Paul some materials that I haven't seen. People here are smart, hard working and want to do the right thing. I'm making suggestions to you that you either ignore or don't like and grumble about (the micromanagement comment last night) – but my experiences here shows that they work. I hope you give that some consideration.

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 7:25 AM
To: Hanson, Robert
Subject: Ferdinand Pecora

Bob:

I mentioned last night that Ferdinand Pecora was chief counsel for the Senate Committee that drafted the 1933 and 1934 Acts, including the key operative language of Section 10(b). Those hearings eventually were named after him, the Pecora Hearings. Pecora warned in his opening words in Wall Street under Oath:

"Under the surface of the governmental regulation of the securities market, the same forces that produced the riotous speculative excesses of the 'wild bull market' of 1929 still give evidences of their existence and influence. Though repressed for the present, it cannot be doubted that, given a suitable opportunity, they would spring back into pernicious activity. Frequently we are told that this regulation has been throttling the country's prosperity. Bitterly hostile was Wall Street to the enactment of the regulatory legislation. It now looks forward to the day when it shall, as it hopes, reassume the reigns of its former power. . . ."

When the SEC declines to question "industry captains," when an investigation suggests it is the next logical step, we are granting them a pass to play the trading game by their own rules. We do the same when we set artificially high barriers to question them that do not exist for others, e.g., don't question them about going over the wall until we proved they have already made the trip.

I don't think Pecora was suggesting that regulatory scrutiny be delayed until we have another market collapse. I do not think he would have delayed a heartbeat before taking John Mack's testimony on the record in this matter. Mack had multiple motives, Samberg's trust, contact with Samberg at the key moment, and two possible sources for the tip. He should be asked the obvious questions.

Gary

Hanson, Robert

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 3:26 PM
To: Kreitman, Mark J
Subject: FW: Mack testimony

More of the same.

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 3:05 PM
To: Aguirre, Gary J.
Subject: RE: Mark testimony

Gary,

I read your "over the wall" e-mail when you sent it by cc to me. I assumed that Mark used that phrase to mean whether Mack had the information, not in the technical sense of the phrase (I doubt the technical sense would have any relevance to this case). I still recommend that we try and figure out whether Mack had the information before approaching him.

Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony. As far as I know politics are never involved in determining whether to take someone's testimony. I've not seen it done at this agency. It does make sense though to have all your ducks in a row before approaching a significant witness like Mack. Hence, the reason to try and figure out a number of things about him before scheduling him up, not least of which is whether he knew about the deal.

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Sent: Wednesday, August 24, 2005 1:58 PM
To: Hanson, Robert
Subject: RE: Mark testimony

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To: Aguirre, Gary J.; Jama, Ubaa A.; Eichner, Jim
Cc: Hanson, Robert
Subject: RE: Request pending matters.

Where are we on determining the date Mack was brought over the wall re GE-Heller deal – the necessary prerequisite to subpoena to Mack?

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To: Aguirre, Gary J.
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To: Jama, Liban A.; Aguirre, Gary J.
Subject: FW: Mack testimony

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Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

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sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

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Samberg had a relationship of trust deep friendship with Mack

Unknown

From: Hanson, Robert
Sent: Wednesday, August 24, 2005 4:31 PM
To: Aguirre, Gary J.
Subject: RE: Mack testimony

Gary,

We seem to have different recollections of what I said.

Moreover, I get the sense that you feel there is some hidden motivation for not wanting to take Mack's testimony now that I don't quite understand. I'm not sure what you think this is about (using your words), but, as I've mentioned before, and will mention again, we should try to figure out a number of things about Mack before scheduling him up. You can disagree with that course of action, which is perfectly fine by me, but you need to convince me and others that your course is the more appropriate one. One way to do that, which I suggested, was to write a clear and concise memo laying out all of the facts as to why to take Mack's testimony at this point (I believe that everyone feels we will take Mack's testimony at some point – the question is when). I think you've prepared that memo and I've forwarded it on to Paul and Mark to digest. If there is other information beyond that memo and the other e-mails you sent to me and Mark in June, please let me know.

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 3:59 PM
To: Hanson, Robert
Subject: RE: Mack testimony

See my comments below.

Gary J. Aguirre
Senior Counsel
Division of Enforcement
Securities and Exchange Commission
Phone: [redacted]
Fax: [redacted]
mailto: [redacted]

From: Hanson, Robert
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Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop

on the testimony. As far as I know politics are never involved in determining whether to take someone's testimony. I've not seen it done at this agency. It does make sense though to have all your ducks in a row before approaching a significant witness like Mack. Hence, the reason to try and figure out a number of things about him before scheduling him up, not least of which is whether he knew about the deal. Bob, this is spin. You told me it would be tough to take Mack's testimony because he has political clout. An artificially high barrier has been set for his exam. I do not think this is proper. Doing so clashes with the SEC's mission. It also stops me from doing my job as a federal officer.

Less importantly, perhaps I was wrong but I thought the word assessment came from your e-mail. If not, my bad. As for urgency, I just wanted to understand when Paul asked for the information, since I heard it from him but never from you (not the normal way to keep informed). Also, can I get a copy of the lengthily e-mails or memos you sent Paul in mid-July? I sent one in mid-July; I understood my memo of August 4 to you was for Paul. I am not sure whether Paul wanted it distributed. It's important for me to be kept in the loop on things that have a bearing on the case.

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Samberg had a relationship of trust deep friendship with Mack

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend.

In July 2001, Samberg's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the

guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

> The company was about to split, it was about to split. In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and *I did things in a manner that was expedient at the time given my expertise in this area.*

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. *Times were fragile.* I needed their approval to do whatever I wanted to do *or they might walk* (emphasis added).

There do not appear to be other leads in the Samberg e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Samberg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Samberg's circles.

Gary

Merit Pay

Supervisory Transmittal Form

Employee Name: Gary Aguirre

Supervisor Name: Robert Hanson

Supervisor Recommendation: This employee has:

_____ made contributions of the highest quality

__✓__ made contributions of high quality

_____ made contributions of quality

_____ made no significant contribution beyond an acceptable level of performance

Supervisor's Signature _____ Date 6/2/05

This recommendation is provided as guidance to the Compensation Committee and does not correlate to a level of merit pay increase.

Compensation Committee Recommendation:

_____ Merit Increase(s)

[redacted]

SEC.00030

Gary Aguirre

I supervised Gary Aguirre from January 18 2005 through the end of the rating period. As shown on his contribution statement, Gary worked extremely hard on one investigation during his time in the group, a significant matter involving the trading by Pequot Capital, one of the nation's largest hedge funds.

Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has consistently gone the extra mile, and then some.

Gary can work on presenting information in a clearer and more concise manner to enhance the effectiveness of his communications both to those he reports to and those he works with.

Written by Robert Hanson

Staiger, Charles

From:	Kreitman, Mark J.
Sent:	Monday, September 26, 2005 5:32 PM
To:	Staiger, Charles
Cc:	Berger, Paul
Subject:	Gary's Evaluation

Chuck –

I don't know if the paragraph below, which was my evaluation of Gary (separate from Bob Hanson's), made it into his record. Paul suggests that it should be so included. Thanks. Mark

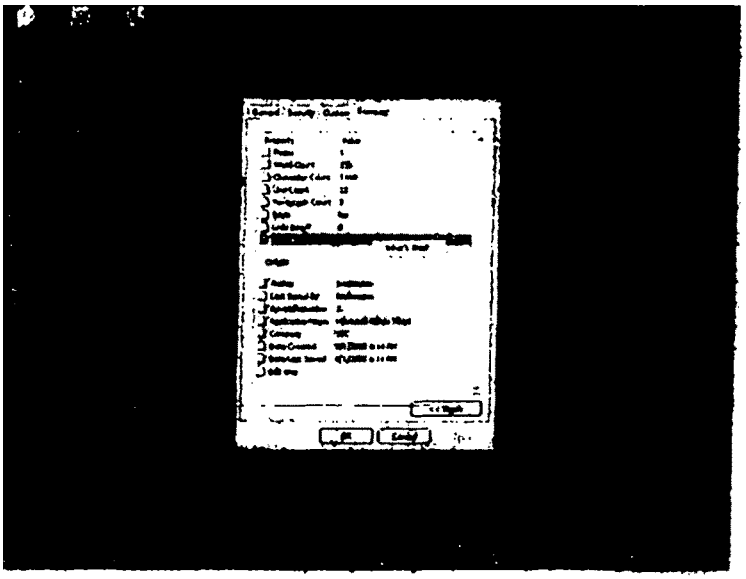
Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff-attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

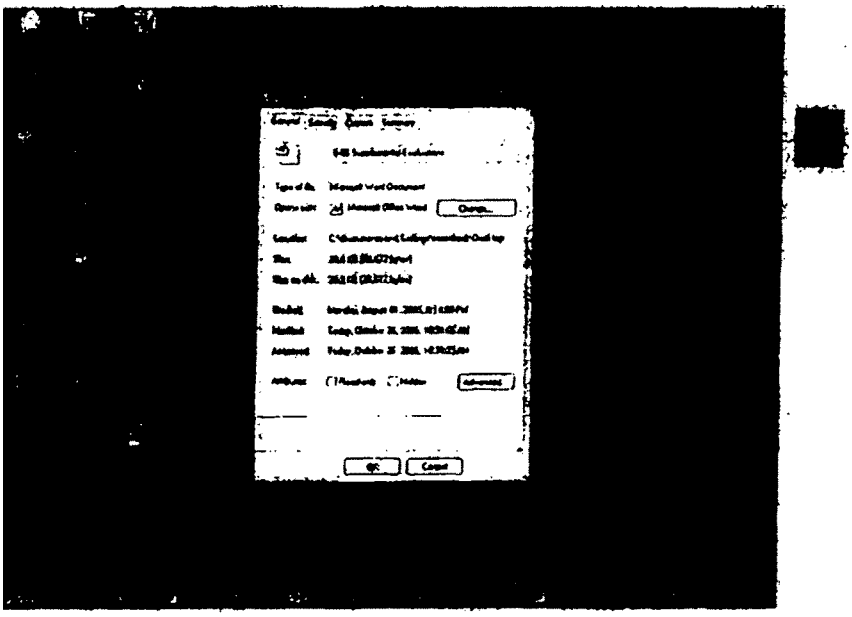
Andrews, Kelly J.

From: Kreitman, Mark J.
Sent: Monday, October 24, 2005 6:14 PM
To: Andrews, Kelly J.
Subject: Supplementary Evaluation

8-05 Supplemental Evaluations...

Shows on my computer as created 8/1/05 6:14 p.m.





Supplemental Evaluations:

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Swanson: Rob puts in long hours, takes advantage of expertise available throughout the Commission, and develops creative investigative models. He occasionally has difficulty, however, working within a structured organizational framework and fails adequately to consult his supervisors with respect to tactical and strategic decisions. For example, he has dispatched subpoenas without first clearing them with his branch chief, and taken legal positions without full consideration of conflicting decisions.

Andrews, Kelly J.

From: Kreitman, Mark J.
Sent: Monday, October 24, 2005 6:21 PM
To: Andrews, Kelly J.
Subject: FW: Gary's Evaluation

From: Kreitman, Mark J.
Sent: Thursday, September 29, 2005 12:16 PM
To: Berger, Paul
Subject: Gary

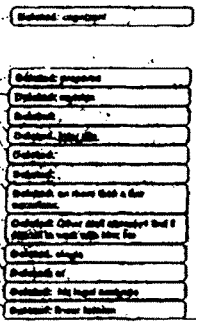
Paul – Linda Borostovik and Juanita Hernandez advise that my written evaluation should be included in Gary's personnel form. A copy is attached. Mark

Evaluation of Gary Aguirre.doc...

Evaluation of Gary Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chef, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Supplemental Evaluations:

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. He is willing to go the extra mile. But he is resistant to supervision and insufficiently aware of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he issued required retraction to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency (don't think we should allege if it only raises a question). His desire to maintain complete control of his investigation seems to preclude full and open sharing of information with others. He has difficulty explaining the significance of evidence his investigation uncovered in a clear and well-organized manner and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.



Andrews, Kelly J.

From:	Kreitman, Mark J.
Sent:	Monday, October 24, 2005 6:14 PM
To:	Andrews, Kelly J.
Subject:	Supplementary Evaluation

[redacted]

8-05 Supplemental Evaluations....

Shows on my computer as created 8/1/05 6:14 p.m.

Supplemental Evaluations:

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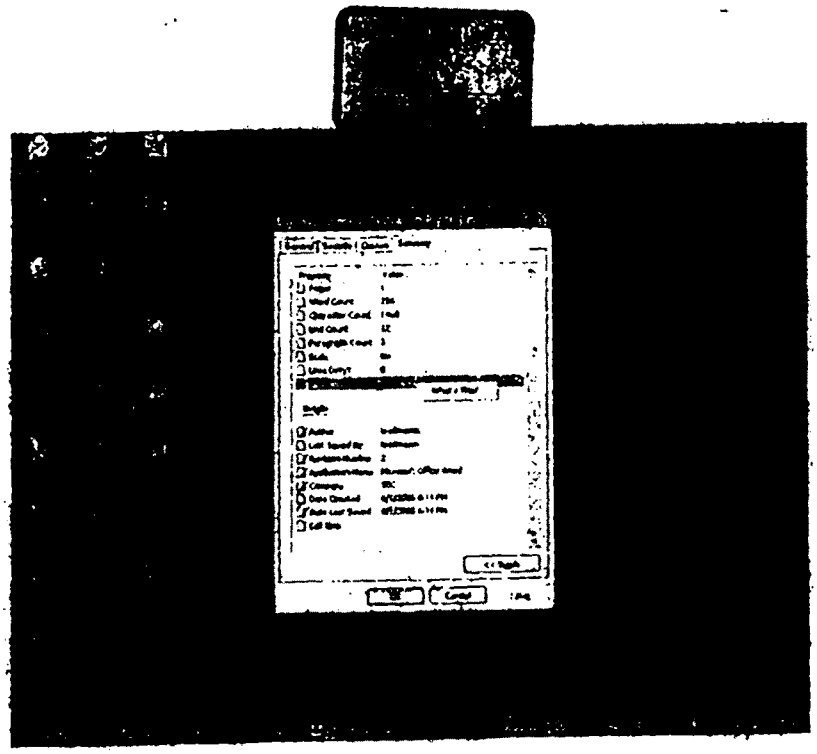
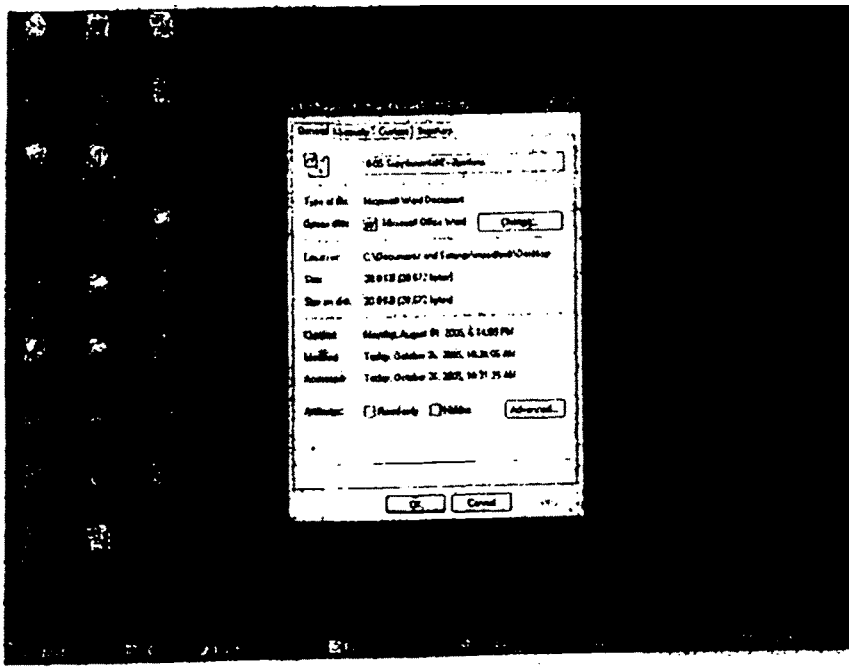
Swanson: Rob puts in long hours, takes advantage of expertise available throughout the Commission, and develops creative investigative models. He occasionally has difficulty, however, working within a structured organizational framework and fails adequately to consult his supervisors with respect to tactical and strategic decisions. For example, he has dispatched subpoenas without first clearing them with his branch chief, and taken legal positions without full consideration of conflicting decisions.





Andrews, Kelly J.

From: Kreitman, Mark J.
Sent: Monday, October 24, 2005 6:22 PM
To: Andrews, Kelly J.
Subject: FW: Gary's Evaluation

From: Stalger, Charles
Sent: Friday, September 30, 2005 4:17 PM
To: Kreitman, Mark J.
Cc: Berger, Paul; Borostovik, Linda
Subject: RE: Gary's Evaluation

Mark,

I spoke with Linda Borostovik and she needs some clarification for her supervisors. During the merit process earlier in the summer, was Gary given a copy of Hanson's supervisory endorsement? If not in writing, was Gary verbally given Hanson's supervisory endorsement? Was the endorsement below given to Gary either verbally or in writing?

Chuck

From: Kreitman, Mark J.
Sent: Monday, September 26, 2005 5:32 PM
To: Stalger, Charles
Cc: Berger, Paul
Subject: Gary's Evaluation

Chuck –

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Aguirre.

Kelly Andrews
October 26, 2005

I called Kreitman on October 25, 2005, to follow up with him about documents he e-mailed me. Specifically, I asked Kreitman if he responded to the September 30, 2005 e-mail from Chuck Staiger to Kreitman asking Kreitman if Aguirre was given a copy of the evaluation either in writing or verbally. Kreitman told me that he responded verbally to Staiger's e-mail, telling Staiger that he had "transmitted the substance" of the evaluation a number of times to Aguirre verbally. Kreitman said that he normally meets with staff twice regarding their evaluation, first to discuss their work and second to tell them their step increase and give them the written evaluations and a copy of their own contribution statement. Kreitman said that he did not have the second meeting with Aguirre because he had already been terminated at that point. Kreitman was unsure of the date that he and Hanson would have first met with Aguirre about his work performance.

Kelly Andrews
October 26, 2005

SEC – 00443

C000443

Borostovik, Linda

From: Staiger, Charles
Sent: Thursday, October 06, 2005 10:32 AM
To: Borostovik, Linda
Subject: FW: Gary's Evaluation

[redacted]

-----Original Message-----
From: Kreitman, Mark J.
Sent: Friday, September 30, 2005 6:02 PM
To: Staiger, Charles
Subject: Re: Gary's Evaluation

None of the above
Sent from BlackBerry Wireless Handheld.

-----Original Message-----
From: Staiger, Charles [redacted]
To: Kreitman, Mark J. [redacted]
CC: Berger, Paul [redacted] Borostovik, Linda [redacted]
Sent: Fri Sep 30 16:17:20 2005
Subject: RE: Gary's Evaluation

Mark,

I spoke with Linda Borostovik and she needs some clarification for her supervisors. During the merit process earlier in the summer, was Gary given a copy of Hanson's supervisory endorsement? If not in writing, was Gary verbally given Hanson's supervisory endorsement? Was the endorsement below given to Gary either verbally or in writing?

Chuck

From: Kreitman, Mark J.
Sent: Monday, September 26, 2005 5:32 PM
To: Staiger, Charles
Cc: Berger, Paul
Subject: Gary's Evaluation

Chuck --

I don't know if the paragraph below, which was my evaluation of Gary (separate from Bob Hanson's), made it into his record. Paul suggests that it should be so included. Thanks. Mark

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[redacted]

Merit Pay

Supervisory Transmittal Form

Employee Name: Gary Aguirre

Supervisor Name: Robert Hanson

Supervisor Recommendation:. This employee has:

_____ made contributions of the highest quality

__✓__ made contributions of high quality

_____ made contributions of quality

_____ made no significant contribution beyond an acceptable level of performance

Supervisor's Signature [signature] Date 6/22/05

This recommendation is provided as guidance to the Compensation Committee and does not correlate to a level of merit pay increase.

Compensation Committee Recommendation:

_____Merit Increase(s)

SEC 00838

Gary Aguirre

I supervised Gary Aguirre from January 18 2005 through the end of the rating period. As shown on his contribution statement, Gary worked extremely hard on one investigation during his time in the group, a significant matter involving the trading by Pequot Capital, one of the nation's largest hedge funds.

Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has consistently gone the extra mile, and then some.

Gary can work on presenting information in a clearer and more concise manner to enhance the effectiveness of his communications both to those he reports to and those he works with.

Written by Robert Hanson

MEMORANDUM

TO: Pequot File
FROM: Tom Conroy
RE: Pequot Short Sales
CC: Eric Ribelin
DATE: August 3, 2005

As part of the investigation into the Matter of Trading in Certain Securities (File HO-09818) we've identified at least three scenarios in which Pequot Capital had executed apparent "wash sales" through executing brokers. Those scenarios are as follows:

1) Wash sales reported as an agency cross in the immediate aftermarket of an IPO;
2) Wash sales reported as an agency cross in the aftermarket of a secondary offering; and,
3) Wash sales in which buy and short sale orders are executed against each other.

Trade blotters received from Pequot pursuant to subpoena suggest that the vast majority of these trades involve no change in beneficial ownership. We believe that in the first two scenarios above, the trades are designed to benefit Pequot by artificially inflating the volume and/or price and thus inflating the value of shares received by Pequot in the offerings. In the third scenario, staff has noted several instances of trading following the wash sale trade in which Pequot does substantial selling, short selling and then buying and/or covering at substantially lower prices. In scenarios one and two, after the execution of the wash sale, we found instances where they would then short these long position.

Regarding the 3 scenarios, we have several questions that we are going to explore with the Prime Broker(s) to the trades. Those questions, among others, are as follows:

1) In scenario 3 is Pequot avoiding the need to borrow stock for a short sale by merely having a wash sale executed which puts them as the buyer of the short sale and essentially loaning and borrowing the stock with themselves;
2) In scenario 3 when Pequot begins the process of executing sales, are those sales reported as long sales or short sales (records suggest sales that are *de facto* short sales are reported as long sales);
3) In scenario 3 when *de facto* short sales are executed are those trades done pursuant to the "tick" or "bid" test (we have identified several trades that appear to be de facto short sales that are executed on downticks);
4) In the shorting of the stock related to scenarios 1 and 2 are they again avoiding the need to borrow for a short sale by shorting their own longs and what happens if they begin selling the longs, and,
5) In general, what are the micro aspects of stock borrows and loans as they relate to these scenarios.

We are concerned that insufficient brokerage surveillance systems may be in place that allow for the execution of manipulative orders that artificially elevate or reduce the price of securities for the benefit of Pequot and to the detriment of market integrity.

MEMORANDUM

VIA: Federal Express, Certified and First Class Mail

TO: Gary J. Aguirre

FROM: Linda Chatman Thomsen by PB
Director, Division of Enforcement

DATE: September 1, 2005

SUBJECT: Notice of Termination During Trial Period

This is to inform you that your employment as a General Attorney (SI), Enforcement Division, will be terminated during your trial period based upon your demonstrated inability to work effectively with other staff members and your unwillingness to operate within the Securities and Exchange Commission (SEC) process. Your termination from the SEC and from the Federal service will be effective at the close of business on Friday September 2, 2005.

You began your employment with the Commission on September 7, 2004. As you were advised at the time of your appointment, an employee who is given a career conditional appointment, as you were, must serve a one-year trial period. It is during this time that an employee has to demonstrate fully his/her qualifications for continued employment.

Several times throughout your trial period, your supervisors advised you that your conduct was inappropriate. You were permitted to transfer from one Assistant Director group to another after assuring your Associate Director that problems that had occurred, including personality conflicts and resistance to standard supervision, would not recur. However, you have continued to have conflicts with other staff attorneys, your branch chief, and a Trial Unit attorney assigned to your primary case responsibility. You have continually expressed dissatisfaction with the supervisory structure and ignored the chain of command in the Division. On one occasion, you submitted (and later withdrew) your resignation to your Associate Director, and indicated that you were uninterested in participating in preparation of your primary case assignment beyond its investigatory stage. While your substantive work generally has been good, the problems that have occurred in other areas are so significant that they far outweigh the value of that work.

During the last several months, your Associate Director, your Assistant Director, and your branch chief have met with you on several occasions to explain to you the importance of working together with other staff members to achieve consensual goals and the importance of operating within the SEC process.

Since those meetings, your conduct has not improved to the level that warrants retention beyond your trial period. Therefore, your employment with the SEC will be terminated during your trial period, effective September 2, 2005 at 5:00 p.m., in accordance with the provisions of 5 CFR 315.804.

I have reviewed the situation with your supervisors, and this decision represents the consensus reached among them. You may appeal this action to the Merit Systems Protection Board (MSPB) only if you believe it was based on partisan political reasons or marital status. Any such appeal must be submitted in writing, not later than thirty days after the effective date of this action, to the Merit Systems Protection Board, Washington, D.C. Regional Office, 1800 Diagonal Road, Suite 205 Alexandria, VA 22314-2480; e-mail: washingtonregion@mspb.gov.; Fax: (703) 756-7112. Appeal forms are attached. You can access the relevant regulations at www.mspb.gov.

If you have any questions about this notice or your rights, please contact Linda Borostovik, Human Resources Specialist, at [redacted]. Although she may not represent you, Ms. Borostovik is available to answer questions you may have regarding your attendant rights. In addition, we need to coordinate your obtaining personal items from Station Place and returning your laptop, token, identification badge, and office key. You may contact Chuck Staiger at [redacted] to arrange to come into the office for your personal belongings and the return of Commission items or to use a courier service for this purpose.

Attachment: MSPB Appeal Forms

Berger, Paul

From: Berger, Paul
Sent: Wednesday, August 24, 2005 12:09 PM
To: Thomsen, Linda
Subject: Fw: Gary and Pequot

Sorry to bother you with this, but in light of your earlier email I thought I should send this along. Oy!

Paul R. Berger
Division of Enforcement
Securities and Exchange Commission

-----Original Message-----
From: Kreitman, Mark J. <KreitmanM@SEC.GOV>
To: Berger, Paul <BergerP@SEC.GOV>
CC: Hanson, Robert <HansonR@SEC.GOV>
Sent: Wed Aug 24 11:54:29 2005
Subject: Gary and Pequot

Paul --

Long meeting on Pequot yesterday with Bob, Jim and Liban to discuss existing dynamics, transition planning, certain discrete issues raised, inter alia, by Sanberg transcript. Bottom line is that Gary is making life impossible for Jim and Liban. Refuses to treat them as equal partners, is reluctant (or unable) to seriously involve them in strategic/tactical planning, instigates personal feuds. I've also spoken at length privately with Jim; am convinced he can take over and manage Pequot with Liban more efficiently and effectively than Gary. Bob has the same sense, and has conferred with Joe Cella to be sure Market Surveillance would be OK with a transition. Feedback I get from opposing counsel (taking into account their obvious self-interest) suggests Gary's approach with them is not productive. And I fear Gary's view of things here is not a healthy element for the group. Bob and I both feel that it may be appropriate at this juncture, before Gary's probationary period elapses, to consider his termination. I am willing to speak with him friend to friend to see if he would resign voluntarily, in the interest of the Agency's mission to which he is dedicated. Would appreciate your view upon your return.

Best, Mark

-----Original Message-----
From: Berger, Paul
Sent: Wednesday, August 24, 2005 8:13 AM
To: Kreitman, Mark J.
Subject: fw: Mack Testimony

FYI

Paul R. Berger
Division of Enforcement
Securities and Exchange Commission

-----Original Message-----
From: Aguirre, Gary J. <AguirreG@SEC.GOV>
To: Berger, Paul <BergerP@SEC.GOV>
Sent: Wed Aug 24 00:16:48 2005
Subject: Mack Testimony

Paul:

You had requested my analysis why John Mack's testimony should be taken. I had delayed sending it to you in hopes that Mark would be open to this possibility. However, Mark recently told me again that I would have to establish that Mack went over the wall before I could take his testimony. This does not make sense to me or to other staff. I am therefore submitting my analysis directly to you.

I will also be sending you the memo I mentioned during our discussion in my office in mid-July, dealing with the factors that led up to my resignation. I have not had time to prepare it because of the demands of Pequot, my EEOC brief due on August 15 and my scheduled vacation.

Gary

From: Aguirre, Gary J.
Sent: Thursday, August 04, 2005 6:34 PM
To: Hanson, Robert
Subject: Mack testimony

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot Investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements: The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information

The first element is whether Mack had possible access to information that GE would make a tender offer for HF. He had access from two sources: he had been the CEO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant contacts with CSFB at each time. Also, CSFB was "wooing" Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or CS to mention, as part of this wooing process, what inventory Mack would be taking over. Incidentally, we know how Samberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he

learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HF during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team as Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller.

a) Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001. Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million into Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "busting his chops" Samberg's chops because he had not got the documents on this investment. Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 28 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) Board seats As shown on one of the spreadsheets, Samberg was promoting Mack for board seats on both Baby C and Fresh-start.

c) Office Space Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.

d) Stock tips Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."

e) Friendship Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo.

f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not

given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Samberg had a relationship of trust deep friendship with Mack.

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend.

In July 2001, Samberg's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

The company was about to split, it was about to split. In September '00, [redacted] and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and I did things in a manner that was expedient at the time given my expertise in this area.

In a similar vein, he testified at the second session:

My firm was going to split in three months. These people were my other managing director partners. Times were fragile. I needed their approval to do whatever I wanted to do or they might walk (emphasis added).

There do not appear to be other leads in the Samberg e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through

the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Samberg made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Samberg's circles.

Gary

C000371

Stachnik, Walter J.

From: Thomsen, Linda
Sent: Thursday, June 29, 2006 8:24 AM
To: Stachnik, Walter J
Subject: RE: ENF ex-employee

thanks

-----Original Message-----
From: Stachnik, Walter J.
Sent: Thursday, June 29, 2006 8:17 AM
To: Thomsen, Linda; Ricciardi, Walter
Subject: FW: ENF ex-employee

Forgot to send this to you

-----Original Message-----
From: Stachnik, Walter J.
Sent: Thursday, June 29, 2006 8:13 AM
To: Abraham, Anil; Humes, Richard M.
Subject: FW: ENF ex-employee

FYI

-----Original Message-----
From: Sullivan, Mary Beth
Sent: Thursday, June 29, 2006 8:02 AM
To: Stachnik, Walter J.; Egbert, Nelson N.; Woodford, Richard; Andrews, Kelly J.
Subject: FW: ENF ex-employee

Please see below. There seems to be 2 issues here: 1) was the account used after the individual's departure; and 2) why the account wasn't cancelled. For #1, I can ask OIT if they can determine this. Should #2 be referred to one of the auditors? If so, who?

Mary Beth

P.S. I checked and the account is still showing up on Outlook.

-----Original Message-----
From: Gerrity, Joseph
Sent: Wednesday, June 28, 2006 6:41 PM
To: Wilson, David
Cc: Sullivan, Mary Beth
Subject: Re: ENF ex-employee

I would suggest that we send this to oig for referal to go.
I have cc'd mary beth

Regards,
Joe Gerrity
OIT Security
Phone: [redacted]
Cell: [redacted]

-----Original Message-----
From: Wilson, David
To: Booth, Corey; COPS
Sent: Wed Jun 28 18:26:56 2006
Subject: RE: ENF ex-employee

0000592

[redacted]

Preliminary evidence suggests this account was last used in May 2006. I am awaiting a full report tomorrow. Should I involve IG?

-dave

From: Booth, Corey
Sent: Wed 6/28/2006 5:35 PM
To: COPS
Subject: ENF ex-employee

Gary Aguirre is an attorney who left the agency about 10 months ago. He is involved in some Senate Banking Committee testimony, wherein he has been sharing some information that the SEC would regard as nonpublic. Someone in the Chairman's Office noticed that he is still registered in the Outlook address book, which raises the question as to whether his privileges were properly terminated.

Please request a termination of the account, and also check to see whether there has been any login activity, RSA token usage, etc. since his separation.

Stachnik, Walter J.

From: Humes, Richard M.
Sent: Thursday, June 29, 2006 2:09 PM
To: Stachnik, Walter J.
Subject: RE: ENF ex-employee

Thanks for the update.

-----Original Message-----
From: Stachnik, Walter J.
Sent: Thursday, June 29, 2006 2:05 PM
To: Abraham, Anil; Humes, Richard M.; Thomsen, Linda; Ricciardi, Walter
Subject: FW: ENF ex-employee

FYI

-----Original Message-----
From: Sullivan, Mary Beth
Sent: Thursday, June 29, 2006 12:02 PM
To: Stachnik, Walter J.; Egbert, Nelson N.; Andrews, Kelly J.; Woodford, Richard
Subject: FW: ENF ex-employee

Update from OIT

-----Original Message-----
From: Wilson, David
Sent: Thursday, June 29, 2006 11:04 AM
To: Sullivan, Mary Beth; Gerrity, Joseph; Booth, Corey
Subject: Re: ENF ex-employee

Looks like is a false alarm Techs say account has actuallly been 'disabled' since December. I'm still trying to document why it kept sending out an out of office reply. Also, the former user does not have an rsa token and I'm trying to see if we can document whether he ever had a token. More when I get it.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Sullivan, Mary Beth
To: Wilson, David; Gerrity, Joseph
Sent: Thu Jun 29 08:13:29 2006
Subject: RE: ENF ex-employee

Thanks for the info - please let me know what you're able to find out.

MBS

From: Wilson, David
Sent: Wednesday, June 28, 2006 6:48 PM
To: Gerrity, Joseph
Cc: Sullivan, Mary Beth
Subject: RE: ENF ex-employee

C000616

I will contact MB tomorrow when I have better handle on data.

-dave

From: Gerrity, Joseph
Sent: Wed 6/28/2006 6:41 PM
To: Wilson, David
Cc: Sullivan, Mary Beth
Subject: Re: ENF ex-employee

I would suggest that we send this to oig for referal to gc
I have cc'd mary beth

Regards,
Joe Gerrity
OIT Security
Phone:
Cell: [redacted]

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Please request a termination of the account, and also check to see whether there has been any login activity, RSA token usage, etc. since his separation.

Sullivan, Mary Beth

From: Wilson, David
Sent: Thursday, July 06, 2006 12:40 PM
To: Sullivan, Mary Beth; Gerrity, Joseph; Booth, Corey; Hernandez, Juanita C.
Cc: Corrie, James A.; Staiger, Charles
Subject: RE: ENF ex-employee

I think this is a final report:

I interviewed Chuck Staiger, who told me he preserved this account at the direction of Juanita Hernandez with the Office of the General Counsel, which launched an investigation of the user, Gary Aguirre, prior to his departure in Sept. 2005. Mr. Aguirre was separated from the agency while on vacation (which explains why the Out of Office Autoreply feature on his email account was declaring that he'll be back in September). Ms. Hernandez told me that in preparation for the separation, OGC directed Mr. Staiger's office to "freeze" the subject's information technology assets. Presumably the subject's laptop and external storage devices were secured (I don't know and haven't asked). The e-mail account was "disabled," meaning the subject could not log into it. While the subject himself has not accessed SEC systems since September 2005, the email account still existed. One log entry notes that it was accessed in May 2006; I have not attempted to discover who accessed it or what was done (again because this is an ongoing investigation) and it's possible this is an artifact, since such log entries can be generated by something as simple as the an update to the anti-viral softwares. The email account may have been accepting mail all this time; I haven't dug down that deep (and I was also frankly worried about muddying the waters of what appears to be an active investigation). Issues I still haven't resolved: Does somebody else have access to this account? Was/is mail for this account being forwarded? Ms. Hernandez says she is not reading mail sent to the account; I have not pursued this issue beyond her. My concern at this point is that the the data in that account has not been fixed in place; that is, the account appears to me to be live and it is possible that someone has been accessing the account (though not Mr. Aguirre). Put simply, I think it might be difficult to successfully present a chain of custody claim for this account. I would recommend that, if the account is/might be needed for legal action that it be forensically copied onto a hard drive using the agency's current EnCase standard and that hard drive secured as evidence. I presume that the user's laptop has been secured in some fashion all this time; I recommend that similar steps be taken with that laptop's hard drive. And finally, we have removed Mr. Aguirre's name from the Outlook address database, but if you know the address already you can apparently still send email to the account. The autoreply feature has apparently been successfully shut down.

And finally, I've suggested to Ms. Hernandez that OIT Security and OIG get together for a meeting to talk about how the technology works and so they can educate us about their needs.

-dave

-----Original Message-----
From: Sullivan, Mary Beth
Sent: Thursday, June 29, 2006 3:38 PM
To: Wilson, David; Gerrity, Joseph; Booth, Corey
Cc: Corrie, James A.; Wiederkehr, David
Subject: RE: ENF ex-employee

The OIG did not make any requests concernin this e-mail account. You'll have to check with Enforcement on this.

Mary Beth

-----Original Message-----
From: Wilson, David
Sent: Thursday, June 29, 2006 3:31 PM

To: Wilson, David; Sullivan, Mary Beth; Gerrity, Joseph; Booth, Corey
Cc: Corrie, James A.; Wiederkehr, David
Subject: RE: ENF ex-employee

This is getting more complicated.

I have a copy of an email sent by Scott Plimpton of Enforcement to Inder Singh dated June 26 directing Inder to not delete the account in question on the orders of superiors. Scott tells me his orders came from Charles Staiger; I've sent Chuck a note but he's apparently out till Monday. It's possible we've tripped over an ongoing internal investigation (Mary Beth, can you offer us any insights?). I have reason to believe this user was terminated during his probationary period.

To reiterate: The user has not logged in to his account since his termination date in September 2005. The account was deactivated, meaning the user could not access SEC assets.

David Wiederkehr of Enforcement just called and asked me if we could hold off doing anything with this till Chuck is back in town. I am okay with that, since it currently appears as though user does not have access to SEC assets; I can pull the plug on the account if desired, but I would advise against it, as I suspect this account was not deleted in order to pursue an ongoing investigation.

Any orders?

-dave

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From: Wilson, David
Sent: Thursday, June 29, 2006 11:04 AM
To: Sullivan, Mary Beth; Gerrity, Joseph; Booth, Corey
Subject: Re: ENF ex-employee

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I have cc'd mary beth

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Cell: [redacted]

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F ST., N.E.
WASHINGTON, D.C. 20549

(202) 551-4421

September 2, 2005

Via Facsimile to 202-772-9280 and Regular Mail

Chairman Christopher Cox
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20037

Re: In the Matter of Trading in Certain Securities; HO-9818

Dear Chairman Cox:

I am compelled to write to you today, my last day with the Commission, out of a sense of duty to the Commission's mission—to maintain the integrity of the financial markets and to protect the investor. Unfortunately, my supervisors—as far up the chain as I can see—have lost sight of that mission in the above matter. I state the facts briefly below, though there is much more to be said.

I have been the staff attorney in the above matter from mid-September 2004 through today. It is an investigation of suspected insider trading by one of the largest hedge funds in the nation, Pequot Capital Management ("PCM"), arising out of eighteen SRO referrals. Staff who worked on this matter from the beginning—Hilton Foster, Eric Ribelin, Thomas Conroy, and I—believe that PCM engages in an institutionalized form of insider trading that corrupts the financial markets and creates an un-level playing filed for honest investors.

As the investigation progressed, one matter diverted all others, suspected insider trading by PCM's CEO, Arthur Samberg, during July 2001, just before the General Electric Company ("GE") acquired Heller Financial, Inc. ("Heller"). Mr. Samberg bought $44 million in Heller stock and shorted $36 million in GE stock shortly before the public announcement of the acquisition on July 30, 2001, making an $18 million profit. On the two occasions I took Mr. Samberg's testimony, he could offer no credible explanation for these trades. Everyone involved in this investigation has informed me of their belief Mr. Samberg obtained material non-public information prior to these trades. The only question is: from whom?

Only one person meets the tipper's profile: John Mack, the current CEO of Morgan Stanley. I began informing my supervisors of this evidence in early June. Later in the month, I suggested that Mr. Mack's testimony be taken. On approximately June 23, my Branch Chief, Robert Hanson, told me that it would be very difficult to obtain approval to take Mr. Mack's testimony because of his powerful political connections. Mr. Hanson later repeated the same

statements to me on several other occasions. Some are confirmed by e-mails. Assistant Director Kreitman participated in one of these discussions.

Other events also suggest the decision to take Mr. Mack's testimony has not been handled in the normal course. For example, I have issued approximately 100 subpoenas in this matter and all responsive documents came directly to me. When I served a subpoena on Morgan Stanley seeking documents relating to contacts between Messrs Mack and Stenberg, its counsel did not initially send them to me. Rather, she first sent them to Linda Thomsen. Likewise, Morgan Stanley's counsel, Mary Jo White, bypassed the normal protocol of dealing with the staff attorney. Instead, she dealt directly with Ms. Thomsen by correspondence and phone. Of hundreds of contacts with defense counsel, this is the first time any defense counsel began discussions at the top of the chain of command. Further, at the same time, my supervisors excluded me from the discussions involving Mr. Mack.

To avoid any misunderstanding, from late June through late August, I sent multiple e-mails to my Branch Chief Robert Hanson, Assistant Director Mark Kreitman, and Associate Director Paul Berger, as well as a brief e-mail to Linda Thomsen, expressing my concerns. I had no success in obtaining their approval to take Mr. Mack's testimony. Instead, they fired me. Immediately prior to the Mack controversy arising, my Branch Chief and Assistant Director congratulated me for the excellent job I was doing in this investigation. Indeed, Mr. Kreitman gave what he called his highest "Perry Mason award" in mid-June.

I bring these facts to your attention in hopes that you will take whatever steps are appropriate to put this investigation back on track, consistent with the Commission's mission.

I must add that other improper motives also led to my termination, but there is no productive reason to discuss them here.

Sincerely,

Gary J. Aguirre
Senior Counsel

CC: Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth
(By fax and Regular Mail)

From: Aguirre, Gary J.
Sent: Thursday, February 17, 2005 2:04 PM
To: Hurmes, Richard M.
Subject: FOIA request

Mr. Hurmes:

Do you have an open door policy? I was recently privy to some disturbing comments regarding your office's policy in responding to FOIA requests. I would like to find out the facts first hand.

Sincerely,

Gary Aguirre

OFFICE OF THE CHAIRMAN

Correspondence Tracking Sheet

Date Assigned:	09/07/2006
Date Of Corres:	09/02/2005
Due Date:	
Control #:	ES113595
Master #:	735448
Contact Type:	FAX
Assigned To:	Waller Stachnik IG
Action Required:	For Your Information
Correspondent:	GARY J AGUIRRE
Affiliation:	ENF - SENIOR COUNSEL
Constituent:	
Subject:	IN THE MATTER OF TRADING IN CERTAIN SECURITIES: HO-9618
Special Instructions:	REASSIGNED FROM ES TO INSPECTOR GENERAL
Copies To:	Uhlmann Cox Thomsen

COMPLETE THIS SECTION AND RETURN TO THE EXECUTIVE CORRESPONDENCE UNIT, OFFICE OF THE CHAIRMAN, ROOM 6106, STOP 6-1

Drafted By: **Phone:**

Division Approval: **Date:**

Comments: Sam [redacted]

CHAIRMAN'S OFFICE REVI

Vicki Chairman's [redacted] Correspondence (Sam/gc)

1 or more EED cases out there. Juanita

10/6 Sam Forstein wanted to respond.

to: Chairman's Corresp.

EXHIBIT K

E0000432

ES/13595

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F ST., N.E.
WASHINGTON, D.C. 20549

WRITER'S DIRECT DIAL LINE
(202) 551-4437

September 2, 2005

Via Facsimile to 202-772-9200 and Regular Mail

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Washington, DC 20037

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Sincerely,

Gary J. Aguirre
Senior Counsel

CC: Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth
(By fax and Regular Mail)

Hardy, Melinda

From: Kreitman, Mark J.
Sent: Friday, June 24, 2005 12:22 PM
To: Berger, Paul
Subject: RE:

Many thanks.

-----Original Message-----
From: Berger, Paul
Sent: Friday, June 24, 2005 12:13 PM
To: Kreitman, Mark J.
Subject: Re:

I'm not in aplace where I can call right now. Give me 15 minutes and I'll call.

Paul R. Berger
Division of Enforcement
Securities and Exchange Commission

-----Original Message-----
From: Kreitman, Mark J. [redacted]
To: Berger, Paul [redacted]
Sent: Fri Jun 24 12:11:59 2005
Subject: RE:

A quick call to confirm the propriety of my plan would help, if it's not too inconvenient.

-----Original Message-----
From: Berger, Paul
Sent: Friday, June 24, 2005 12:11 PM
To: Kreitman, Mark J.
Subject: Re:

I'm out of the office for about 2 and half hours. Can it wait till I get back?

Paul R. Berger
Division of Enforcement
Securities and Exchange Commission

-----Original Message-----
From: Kreitman, Mark J. [redacted]
To: Berger, Paul [redacted]
Sent: Fri Jun 24 12:09:26 2005
Subject:

Paul - I have a call from Eric Dinallo at Morgan Stanley. Before responding, I'd like your advice. It's a matter of some urgency and delicacy. Can you please give me a call? Thanks. Mark

[redacted]

U. S. Securities and Exchange Commission
Performance Plan and Evaluation

[redacted]

Name	From		To	
Aguirre, Gary J.	Month	Year	Month	Year
Title	10	2004	04	2005
General Attorney(s)	Period Covered by this Evaluation			
Division/Office/Field Office	☐ Entire Performance Evaluation Period			
Enforcement				
Pay Plan, Series, Grade, Step	☐ Detail (From:_____To:_____)			
SK- 0905 - 14 - 24	☐ Other (specify)_____			

[redacted]

Employee Signature	Date 11/1/04
Supervisor/Rating Official Signature	Date
Employee Signature	Date
Supervisor/Rating Official Signature	Date 11/1/04
Employee Signature	Date 6/1/05
Supervisor/Rating Official Signature	Date 6/1/05

[redacted]

☒ Acceptable ☐ Unacceptable

SEC 2494 (5/03)

[redacted]

Critical Elements and Acceptable Standards	Results	
	Acceptable	Unacceptable
Knowledge of Field or Occupation - Maintains and, with few exceptions, demonstrates technical skills essential to performing duties of the position, including knowledge of pertinent laws, standards, regulations, rules, policies, procedures, and technologies.	☒	☐
Planning and Organizing Work - With few exceptions, recognizes and solves problems, meets objectives, and considers priorities when planning work assignments. Efficiently uses time and resources to produce a quality product with appropriate guidance and completes assignments within agreed upon time frames.	☒	☐
Execution of Duties - With few exceptions, thoroughly and carefully analyzes and researches assignments. Effectively applies necessary knowledge and technical skills in order to perform duties of the position in an acceptable manner. Final work products meet established need, reflect appropriate attention to detail, and are well organized.	☒	☐
Communications - Oral and written communications further agency objectives and, with few exceptions, are clear, concise, well organized, accurate, grammatically correct, and appropriate for the intended audience. Required personal interactions with internal and external constituencies/ counterparts are generally responsive to the needs of these individuals or entities. Keeps these entities and management apprised of relevant issues, changes, and problems as directed.	☒	☐

SEC 2494 (5/03)

Memorandum

October 5, 2005

To: Gary Aguirre 2005 Supervisory Summary File

From: Charles Staiger
Division of Enforcement

The attached supervisory summary from Mark Kreitman mistakenly did not go to the compensation committee. It is being made available to Gary as Berger/Kreitman have requested it be part of the record.

[redacted]

Staiger, Charles

From:	Kreitman, Mark J.
Sent:	Monday, September 26, 2005 5:32 PM
To:	Staiger, Charles
Cc:	Berger, Paul
Subject:	Gary's Evaluation

Chuck –

I don't know if the paragraph below, which was my evaluation of Gary (separate from Bob Hanson's), made it into his record. Paul suggests that it should be so included. Thanks. Mark

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty xplaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Borostovik, Linda

From: Borostovik, Linda
Sent: Thursday, October 06, 2005 11:26 AM
To: Staiger, Charles
Cc: Cunningham, David
Subject: RE: Gary's Evaluation

Chuck -

I discussed this with Dave Cunningham and it is fine to give Gary his own contribution statement, and his supervisor's statement, including the statement below. I suggest that you print the message from Kreitman and note something to the effect that although it mistakenly did not go to the compensation committee, you are giving it to Gary as Berger/Kreitman have requested it be part of the record.

Please let me know if you have any questions.

Thanks
Linda

-----Original Message-----
From: Staiger, Charles
Sent: Thursday, October 06, 2005 10:32 AM
To: Borostovik, Linda
Subject: FW: Gary's Evaluation

-----Original Message-----
From: Kreitman, Mark J.
Sent: Friday, September 30, 2005 6:02 PM
To: Staiger, Charles
Subject: Re: Gary's Evaluation

None of the above
Sent from BlackBerry Wireless Handheld.

-----Original Message-----
From: Staiger, Charles <[redacted]
To: Kreitman, Mark J. [redacted]
CC: Berger, Paul [redacted] Borostovik, Linda [redacted]
Sent: Fri Sep 30 16:17:20 2005
Subject: RE: Gary's Evaluation

Mark,

I spoke with Linda Borostovik and she needs some clarification for her supervisors. During the merit process earlier in the summer, was Gary given a copy of Hanson's supervisory endorsement? If not in writing, was Gary verbally given Hanson's supervisory endorsement? Was the endorsement below given to Gary either verbally or in writing?

Chuck

From: Kreitman, Mark J.
Sent: Monday, September 26, 2005 5:32 PM
To: Staiger, Charles
Cc: Berger, Paul
Subject: Gary's Evaluation

Chuck -

I don't know if the paragraph below, which was my evaluation of Gary (separate from Bob Hanson's), made it into his record. Paul suggests that it should be so included. Thanks. Mark

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chef, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Tracking:	Recipient	Read
	Staiger, Charles	
	Cunningham, David	Read: 10/6/2005 11:28 AM

Andrews, Kelly J.

From: Kreitman, Mark J.
Sent: Monday, October 24, 2005 6:21 PM
T : Andrews, Kelly J.
Subject: FW: Gary's Evaluation

From: Kreitman, Mark J.
Sent: Thursday, September 29, 2005 12:16 PM
To: Berger, Paul
Subject: Gary

Paul – Linda Borostovik and Juanita Hernandez advise that my written evaluation should be included in Gary's personnel form. A copy is attached. Mark

Evaluation of Gary Aguilera.doc...

Evaluation of Gary Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chef, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

COMPENSATION COMMITTEE DATES

July 18, 2005	Compensation Committee review beginning at 9:00; members were advised to leave entire day open for meeting.
July 19, 2005	Linda Thomsen receives Compensation Committee recommendations
July 27, 2005	Linda Thomsen, the Deciding Official, finishes merit pay process for Division of Enforcement
August 1, 2005	Division of Enforcement transmits final results to Office of Human Resources

Grime, Richard

From:	Berger, Paul
Sent:	Monday, January 09, 2006 3:02 PM
To:	Grime, Richard; England, Timothy; Kreitman, Mark J.; Kaplan, Robert
Subject:	Debevoise & Plimpton

Please let me know if Debevoise has entered an appearance in any of your matters. I would appreciate it if you would keep this confidential. Thanks.

Paul

SEC00 1478

Kemerer, Hannibal (Judiciary-Rep)

From: Cobb, Jane [redacted]
Sent: Monday, September 25, 2006 11:25 AM
To: Foster, Jason (Finance-Rep); Kemerer, Hannibal (Judiciary-Rep)
Subject: Paul Berger contact to Debevoise

From: Berger, Paul [redacted]
Sent: Thursday, February 09, 2006 5:44 PM
To: Missing, John B.
Subject: Resume

Attached is my resume.

Paul <<prbresume.prb.doc>>

[redacted]

PAUL R. BERGER
[redacted]

PRESENT POSITION

2000 – Present *Associate Director*, Division of Enforcement, United States Securities and Exchange Commission.

Supervises a broad range of enforcement activities, including financial fraud cases (*Lucent, Xerox*, and *Livent*); auditor cases (*KPMG/Xerox, KPMG/AIM, Morel Ernst & Young, Ernst & Young/PeopleSoft, PwC/Avon*); FCPA cases (*Triton, Baker Hughes, Syncor, ABB, Monsanto, Titan*); broker dealer cases (*Knight Securities* and *NationsBank*); insider trading cases (*Nalco* and *McDermott*); Regulation FD cases (*Schering-Plough* and *Flowserve*); and executive compensation cases (*General Electric* and *Tyson Foods*). Currently chairs the Division's *Financial Fraud Task Force* (2000 -- present).

PREVIOUS EXPERIENCE

1996 - 2000 *Assistant Director*, Division of Enforcement

1994 – 1996 *Branch Chief*, Division of Enforcement

1992 – 1994 *Senior Counsel*, Division of Enforcement

1989 – 1992 *Associate*, Jenner & Block, Washington, DC

1986 - 1989 *Staff Attorney*, U.S. Court of Appeals for the District of Columbia Circuit

1985 – 1986 *Attorney*, John P. Meade, O'Connor & Hannan, Washington, DC

1983 - 1985 *Attorney*, Law Offices of Jan Schneider, Washington, DC

EDUCATION

Antioch School of Law	JD 1982
University of Wisconsin	Ph.D. Candidate, 1972-1974
The American University	BA 1972 *(cum laude)*

AWARDS

Stanley Sporkin Award
Chairman's Award for Excellence

Grime, Richard

From:	Berger, Paul
Sent:	Friday, February 10, 2006 11:01 AM
To:	Grime, Richard; England, Timothy; Kreilman, Mark J.; Kaplan, Robert
Subject:	Recusals

Just as update. I am recused from any matters involving Debevoise & Plimpton and Goodwin Proctor. Again, please keep confidential. Thanks.

Paul

Hardy, Melinda

From: Berger, Paul
Sent: Tuesday, May 30, 2006 4:37 PM
To: 'Martin, Denise'
Subject: RE: NYC Travel

Thanks Denise.

Paul

From: Martin, Denise [redacted]
Sent: Tuesday, May 30, 2006 4:29 PM
To: Berger, Paul
Subject: NYC Travel

Per your inquiry,
1. April 24 roundtrip same day
2. April 20 roundtrip same day
3. March 21 roundtrip same day
4. Feb. 16 roundtrip same day
5. Feb. 1 roundtrip same day

Please call if you need anything else.
Denise Martin

Hardy, Melinda

From: Berger, Paul
Sent: Thursday, September 08, 2005 5:01 PM
To: West, Lawrence
Subject: RE: debevoise

Thanks

-----Original Message-----
From: West, Lawrence
Sent: Thursday, September 08, 2005 4:34 PM
To: Berger, Paul
Subject: debevoise

Mary Jo just called. I mentioned your interest.

Williams, Betty J.

From: Kreitman, Mark J.
Sent: Thursday, September 01, 2005 1:21 PM
To: Hardy, Melinda
Subject: RE: What I plan to say at 1:30

Thanks, Lindy.
Will, of course, implement your suggestions.
Mark

From: Hardy, Melinda
Sent: Thursday, September 01, 2005 1:20 PM
To: Borostovik, Linda; Kreitman, Mark J.; Staiger, Charles; Berger, Paul
Cc: Hanson, Robert; Cunningham, David
Subject: RE: What I plan to say at 1:30

Mark,

I agree with Linda's comments and believe that the proposed remarks look appropriate.

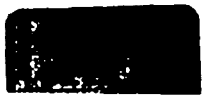
I think you should resist getting into any further discussion of reasons although he will likely want to know more.

Also, as we discussed the other day, you should have someone with you to witness the call.

Finally, we would like to see the draft letter if Aguirre does not resign. We have also discussed in our office the possibility of including in the letter a sentence explaining why he received a two step increase but is now being terminated.

Lindy

From: Borostovik, Linda
Sent: Thursday, September 01, 2005 12:52 PM
To: Kreitman, Mark J.; Hardy, Melinda; Staiger, Charles; Berger, Paul
Cc: Hanson, Robert; Cunningham, David
Subject: RE: What I plan to say at 1:30



Mark –

1. In the first paragraph you might add the bolded language: "I have to advise you that a decision has been made to termination your employment at the Commission ***during the one-year trial period....***"

2. Third paragraph: I suggest that instead of "You can avoid termination by voluntarily resigning..." that you say: ***"In lieu of termination during the trial period, you may elect to resign.*** If you decide to resign..."

You might mention to him that he can send an email resignation or fax it to you, given the circumstances.

Otherwise, I think it looks alright.

Thanks
Linda

From: Kreitman, Mark J.
Sent: Thursday, September 01, 2005 12:44 PM
To: Borostovik, Linda; Hardy, Melinda; Staiger, Charles; Berger, Paul
Cc: Hanson, Robert
Subject: What I plan to say at 1:30

<< File: 9-1.doc >>
Comments please.

SEC 0001292

10/6 + Sam Fortieri

want to respond & do signing
fired b/c c/not follow directions
ltr of resign & rescinding
prob period, last period
suspect nothing there.
respond after ut.

23 diff positions & got 24th.

hiring & firing - Kreitman professor at Touro

well off.
pursuing 2nd case -
EEOC dismiss/dent.

E000501

Sent.
10/12 Equine
10/11 new pkts w/ slightly diff take.

E000502

U.S. SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL

Investigative Plan – Case OIG- 431

Date opened: 10/6/05

Subject(s): ~~Robert Nanon~~ ~~Mark Feathman~~ ~~Linda Thompson~~ ~~Paul Berger~~ Division/Office: Enforcement Division

Allegations: abuse of discretionary authority

Planned Focus and Objectives of the Investigation:
Determine whether Division of Enforcement management gave preferential treatment to person, thereby perverting fair and thorough investigation of matter.

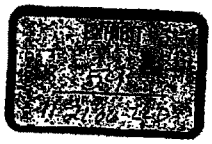
Primary Nature of the Allegations:
____ Criminal ____ Civil ✓ Administrative

Possible Violations of Law, Rule or Regulation:
17 CFR ~~§§~~ 200.735-1, -2, 4-3 (standards of ethical conduct
17 CFR 200.735(a)(2)(ii) (cannot give preferential treatment to any organization or person)
17 CFR 200.66 (misconduct statutes)

Priority of the Case:
____ High ✓ Medium ____ Low

Coordination with Appropriate Authorities (e.g., FBI), if Warranted: N/A
Name of Officials/Agencies: ____ Date of Contact: ____

Rev. February 2004



C000488

Applicable Judicial Venue and Coordination with Prosecutors, when Appropriate: N/A
Venue: _____
Name of Officials/Offices: _____ Date of Contact: _____
_____ _____
_____ _____

Appropriate Administrative Office and Coordination with Adjudicators, when Appropriate:
Name of Officials/Offices: _____ Date of Contact: _____
_____ _____
_____ _____

unsure at this time

Planned Investigative Steps (In Order of Priority):
interview Burkett
review relevant case documents
possibly interview complainant for clarification of claims and/or additional information

Estimated Resources Needed to Complete Investigation:
1 attorney investigator

Estimated Dates for Evaluations of Case Progress:
On or about the first Monday of each month while the case is open

Possible Control Weaknesses Requiring Corrective Action by Management:
not apparent at this time

Coordination with Appropriate Agency or Other Government Officials, if Notable Security or Public Health and Safety Issues Are Raised: N/A
Name of Officials/Agencies: _____ Date of Contact: _____
_____ _____
_____ _____

Completed by: Kelly Andrews Date: 10/11/05
Name/Title

The document is subject to the provisions of the Privacy Act of 1974, and may r
redaction before disclosure to third parties. No redaction has been performed i
Office of Inspector General.

MEMORANDUM

TO: File, OIG-431

FROM: Kelly J. Andrews, Associate Counsel to Inspector General

RE: Recommendation for Closing OIG-431; Abuse of Discretionary Authority

DATE: November 29, 2005

Background and Summary

We opened this investigation on October 6, 2005, after receiving a letter from Gary Aguirre addressed to Chairman Cox dated September 2, 2005 -- Aguirre's last day of employment with the Commission after being terminated during his probationary period. In that letter, Aguirre claimed that his supervisors in the Division of Enforcement (Enforcement) gave preferential treatment to former Chairman of a hedge fund Pequot Capital Management (Pequot) and now Chairman and CEO of Morgan Stanley, John Mack, who Aguirre believed may have been a tipper in the insider trading case involving Pequot that Aguirre was assigned. Specifically, Aguirre asserted that: (1) Enforcement supervisors would not take Mack's testimony because of his "powerful political connections"; (2) Mack's counsel, Mary Jo White, contacted Linda Thomsen, Director of Enforcement, bypassing him as staff attorney; and (3) his supervisors excluded him from conversations involving Mack. On October 11, 2005, Aguirre again wrote to Chairman Cox alleging that he believes that his personnel file was tampered with because his former Assistant Director "retroactively created" a supplemental negative evaluation of him to justify his termination after the fact. In the October letter, Aguirre claims that he had alleged in his earlier letter that he was terminated for unlawful reasons, including that he complained about the preferential treatment of Mack.

As discussed below, the evidence gathered did not show that Mack was given preferential treatment or that Aguirre was terminated because of his complaints about Mack's treatment. In addition, the evidence showed that Aguirre's former Assistant Director wrote the supplemental negative evaluation a month before Aguirre was terminated.[1]

Scope of the Investigation

During the investigation I spoke to each of the Enforcement supervisors involved in the Pequot case, including Branch Chief Robert Hanson, Assistant Director Mark Kreitman, Associate Director Paul Berger, and Director Linda Thomsen. I also spoke to Enforcement's Administrative Contact Charles Staiger and Human Resource (HR) specialist Linda Borostovik. In addition, I reviewed Aguirre's Official Personnel File (OPF) and numerous e-mails and documents related to Aguirre's allegations.

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[1] We did find deficiencies related to the performance evaluation documentation, outlined below.

Results of the Investigation

A. The Alleged Preferential Treatment of John Mack

1. Not Taking Mack's Testimony

Hanson, Kreitman, Berger and Thomsen all said that the issue was not *whether* to take Mack's testimony, but *when* to take it, because they believed that it was premature to take Mack's testimony at the time Aguirre wanted to take it.

Branch Chief Hanson said that the Pequot insider trading case to which Aguirre was assigned had many potential tippers, one of whom is John Mack. Hanson said that Aguirre wanted to take Mack's testimony in the summer of 2005, and that there was a lot of discussion in the office about whether to do so. Hanson said that he and the other Enforcement supervisors, including Director Thomsen, felt that they should get "their ducks in a row" first and figure out Mack's access and motive before taking his testimony. According to Hanson, at that point there was still an outstanding subpoena for documents in the investigation. Hanson said that Associate Director Berger asked Aguirre to write a memo about why taking Mack's testimony at that time was important. Hanson told me that Aguirre sent two different memos, one to Berger and one to himself, and that some of the assertions in the memos were not true. Hanson told me that he did not tell Aguirre that it would be "very difficult to obtain approval to take Mr. Mack's testimony because of his powerful political connections." Rather he tried to convey to Aguirre that he needed to be sure to "have his ducks in a row" and have the evidence lined up before attempting to take testimony from someone who would be well represented. Hanson believes that Aguirre may have misinterpreted his statement.

Associate Director Berger said that Aguirre came to his office four or five times to discuss the Pequot case. Berger also said that he received many e-mails from Aguirre, including one that contained a memo about why Mack's testimony should be taken at that particular time, but that he found it to be largely incomprehensible. According to Berger, Aguirre was supposed to give Berger a second memo about this but never did. Berger said that the issue was not whether to take Mack's testimony, since it likely will be taken, but when to take his testimony. Berger, along with Kreitman and Hanson, thought that it was not the right time to take Mack's testimony because there was no hard evidence that pointed to Mack. In addition, according to Berger, Enforcement still had an outstanding subpoena for documents and had not yet received telephone records in the case. Berger said that ordinarily they would take someone's testimony to lock them in, but that in this case the actions at issue were years old, so that if Mack denied insider trading the staff would have nothing left to ask him. Berger said that he did not have much confidence in Aguirre because Aguirre's supervisors told Berger that Aguirre would sometimes say that there was evidence to support something when there was not. Berger said that he is not afraid of taking testimony of people in high places, and that it is often done in Enforcement.

Assistant Director Kreitman said that there was insufficient evidence to call Mack in for

testimony, and that Enforcement does not drag in ordinary citizens on unfounded suspicion. Kreitman said that there is no doubt that Mack may be a tipper or that there is illegal insider trading in the case, but that none of the five potential tippers have been called in to date. Kreitman also said that it is pointless to call in a witness to testify without evidence of tipping because the witness would likely just deny the tipping and the testimony would end there.

Thomsen said that she heard about the disagreement in the Pequot investigation between Aguirre -- who thought it was important to take Mack's testimony at a particular time -- and Hanson, Kreitman and Berger, who all thought it did not make sense to take Mack's testimony until they received documents from a subpoena request. Thomsen said the issue was not whether to take Mack's testimony, but when to take it, and that the decision of when to take someone's testimony is one that Enforcement struggles with all the time. Thomsen also said that it was not an issue of Mack being a high level person.

All of Aguirre's superiors, including Thomsen, told us that there were legitimate tactical reasons to wait to take Mack's testimony, and not to take the testimony when Aguirre wanted. They also told us that Enforcement often takes the testimony of powerful, high-level persons. There is no evidence that Enforcement did not want to take Mack's testimony because of his "powerful political connections."

2. Counsel for Mack Contacting Thomsen Directly

Thomsen said that she was contacted by former United States Attorney for the Southern District of New York Mary Jo White during the process of vetting Mack for the CEO position at Morgan Stanley. Thomsen told us that White was representing either Mack or Morgan Stanley. According to Thomsen, White told her that she was aware of Enforcement's Pequot investigation involving Mack, and wanted some assurance that Mack would be in the clear. Thomsen said she gave White no assurances, but that it was during that vetting process that Thomsen and White talked about the outstanding subpoena for documents in the Pequot case. Thomsen said that it is not unusual for attorneys to call her about cases instead of calling Enforcement staff working on the case.

Hanson was aware that White had called Thomsen directly once around the time when Morgan Stanley was hiring Mack. Kreitman recalled that Thomsen called him to say that she had received correspondence from White related to the Pequot investigation, and he went to get it from her.

The evidence fails to show that White contacting Thomsen resulted in preferential treatment or affected any decision about taking Mack's testimony.

3. Alleged Exclusion from Meetings

The evidence shows that Aguirre was involved in many, often lengthy, discussions about whether and when to take Mack's testimony. For example, Hanson told us that Aguirre would

often work late and be discussing the case with Kreitman. In addition, according to Berger, Aguirre discussed the case with Berger at least four or five times and sent him e-mails regarding the case. The evidence fails to show that Aguirre was excluded from discussions about Mack's testimony.

B. The Alleged Tampering with Aguirre's Personnel File

Aguirre claimed that a supplemental evaluation of him written by Kreitman, which Aguirre received for the first time after he left the Commission, was "not prepared in the ordinary course of events." Aguirre suggested in his October letter to the Chairman that the supplemental evaluation was created on or about September 26, but made to look as if it were created before his termination on September 2, 2005.[1] The documentary evidence we obtained showed that Kreitman prepared the supplemental evaluation on August 1, 2005 – one month before Aguirre's termination.

We reviewed a September 26, 2005 e-mail from Kreitman to Staiger which stated, "I don't know if the paragraph below, which was my evaluation of Gary (separate from Bob Hanson's), made it into his record. Paul [Berger] suggests that it should be so included." On October 5, 2005, Staiger sent Aguirre a memo with the September 26, 2005, e-mail attached, along with the supplemental evaluation by Kreitman. In that memo, Staiger stated that "[t]he attached supervisory summary from Mark Kreitman mistakenly did not go to the compensation committee."

Hanson told me that sometime around July or August of 2005, Berger told him to be honest in his evaluation of Aguirre, and suggested that Hanson and Kreitman prepare a supplemental evaluation of Aguirre. Hanson also told me that after this meeting with Berger, he went to Kreitman and told him that they needed to prepare a supplemental evaluation of both Aguirre and another employee. Hanson said that Kreitman wrote the first draft of a supplemental evaluation for both employees, including Aguirre. Hanson said that his computer shows that he made edits to Kreitman's draft of the supplemental evaluation on August 1, 2005 at 11:48 a.m., and that he forwarded those edits to Kreitman shortly thereafter at 12:13 p.m.

Berger said that he told Hanson to supplement the contribution statement he had already prepared for Aguirre to include constructive criticism, but that Hanson must have misunderstood

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[1] We found several irregularities with the supplemental evaluation including: it was not dated or signed; it appears to have been created after the merit pay calendar deadline; it was not sent to, or considered by, the compensation committee; it was not in Aguirre's employee personnel file (EPF); and it was separate from the initial evaluation written by Aguirre's immediate supervisor, who should be the only one who prepares a summary on behalf of each employee, according to the merit pay process guidance. We are referring these issues to the audit staff.

him and instead wrote a separate statement.[3] Berger told me that he is not sure if the separate evaluation was sent to the compensation committee, which Berger is on. Berger, however, does recall that he saw the statement before the committee made any decision.

Kreitman told me that he read Hanson's initial evaluation of Aguirre, which he believes was sent to Berger around the end of June. Kreitman said that he decided to write a supplemental evaluation because he felt that Hanson had not sufficiently addressed Aguirre's problems. Kreitman also said that he wrote the supplemental evaluation on August 1, 2005, before it went to the compensation committee. Kreitman added that he later learned that only Hanson's evaluation went to the compensation committee. Kreitman also said that he knows the date that he prepared the supplemental evaluation because it is contained in a Word document that shows it was created on August 1, 2005.[4] Kreitman does not know if Aguirre received a copy of the supplemental rating, but said that Aguirre was already terminated when he would normally meet with staff attorneys and their branch chief to give them their written evaluation and inform them of their step increases.

Thomsen was not familiar with the September 26, 2005 e-mail from Kreitman to Staiger. However, she remembers that Staiger told her that Kreitman wanted to add something to the file. Thomsen said that she told Staiger to be sure that the new material reflected the date it was being added to the file.

The evidence shows that, while not evident on its face, the supplemental evaluation of Aguirre was prepared a month before he was terminated and during the same general time as his merit pay increase was decided. Therefore, there is no evidence that Aguirre's personnel file was tampered with by making it appear that the supplemental evaluation was created before it actually was.

C. The Alleged Unlawful Termination

According to his OPF, Aguirre began at the Securities and Exchange Commission (Commission) on September 7, 2004 as a General Attorney in Enforcement, and was terminated at the end of his probationary period on September 2, 2005. The September 1, 2005 notice of termination sent to Aguirre informed him that he was being terminated for inappropriate conduct, specifically for continuing to have conflicts with various Commission staff and for ignoring the supervisory structure. Hanson, Kreitman, Berger and Thomsen all said that Aguirre did not work well with others or within a supervisory structure.

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[3] Berger believed that Hanson wrote the separate statement of Aguirre, but Kreitman and Hanson told us that Kreitman wrote it.

[4] We were able to confirm that Kreitman created, and last edited, the supplemental evaluation on August 1, 2005 at 6:14 p.m. by reviewing Word properties "metadata" information from the document.

Berger told me that the Pequot case insider trading case that Aguirre opened after he began work at the Commission, was a long and troubled investigation because of Aguirre's involvement. Berger said that Aguirre had became too difficult to work with because he did not work well in a supervisory structure or with others, including staff and outside counsel, and because he did not reason through his decisions. According to Berger, Aguirre seemed to think that he could conduct the entire investigation by himself with no supervision. In addition, Berger said that a couple of subpoenas Aguirre issued violated the law and that Berger received many complaints about Aguirre from outside counsel, including one from a former Chairman. Berger said that Aguirre was volatile and would often walk out of the office for the day. At one point, Aguirre announced that he would resign effective the end of September 2005. Berger said that Kreitman then told him that he thought Aguirre should be terminated before his probationary period ended.

Kreitman said that Aguirre worked out well when he began in his group in January 2005.[5] Kreitman told us that Aguirre had developed and brought the Pequot case with him from another Enforcement group. Kreitman described the Pequot case as a complicated, difficult insider trading case. Kreitman said that there were problems with how the Pequot case was being investigated by Aguirre. For example, Kreitman said Aguirre: (1) refused to work in a supervisory structure, (2) was a loose canon who had threatened to resign, (3) was uncooperative with, and disrespectful to, the two staff attorneys assigned to the Pequot case after Aguirre told staff that he was resigning from the Commission at the end of September 2005, (4) would not take supervision from Hanson, and (5) sent out subpoenas which violated protocol and criminal statutes resulting in the subpoenas being recalled. In addition, Kreitman told me that Berger received many complaints from opposing counsel about Aguirre. Kreitman also told me that he, Thomsen, Berger, and Hanson reached a consensus that Aguirre should be terminated. Kreitman said that he drafted the termination letter and then called Aguirre, who was on leave, to fire him.

Hanson said that he supervised Aguirre from approximately January or February 2005, after Aguirre requested to be, and was, transferred from another Enforcement group, until Aguirre's termination.[6] Hanson rated Aguirre "pass" and recommended him for a two-step increase on June 29, 2005. Hanson said that Aguirre's performance in his group before his June

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[5] Kreitman told me that he knew Aguirre before he began work at the Commission because Aguirre was a student in Georgetown's LLM program where Kreitman taught. Kreitman said that they were friends and would socialize while Aguirre was at the Commission, but that Berger made the decision to transfer Aguirre from Assistant Director Grimes' group to Kreitman's group.

[6] The documentary evidence shows that Aguirre began working in Hanson's group on January 18, 2005, but Aguirre's transfer did not become effective until March 20, 2005.

E000306

29 rating was fine, but devolved after that.[7] Hanson said that Aguirre was terminated during his probationary period because he did not work well with others, had poor writing and communication skills, and that, while he had some good ideas, he made serious mistakes. For example, Hanson said that former Enforcement Director Gary Lynch called him about an improper request Aguirre had made to Lynch to keep information confidential, which violates Enforcement policy.

Director Thomsen told me that she discussed Aguirre's termination with Berger, Kreitman and Hanson in her office. Thomsen recalled that Aguirre's termination process was accelerated because Aguirre had told Enforcement that he was resigning at the end of September, but then changed his mind. Thomsen said that Aguirre seemed unhappy working at the Commission both before and after he moved to Kreitman's group.

All of Aguirre's superiors stated that Aguirre had problems working within a supervisory structure and getting along with others. The evidence failed to show that Aguirre's complaints about Mack's alleged preferential treatment had anything to do with his termination.

Conclusion

Based on the work performed during our investigation, the evidence gathered failed to substantiate the allegations that Mack was given preferential treatment, that any Enforcement supervisor retroactively created an evaluation to support Aguirre's termination, or that Aguirre was terminated because of his complaints related to the alleged preferential treatment of Mack. Based on the foregoing, I recommend closing this investigation.

Concur: Mary Beth Sullivan Date: Nov. 29, 2005
Mary Beth Sullivan

Approved: W Stachnik Date: 11/29/05
Walter Stachnik

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[7] Kreitman said that he concurred with Aguirre getting two steps as a merit promotion, even though he had problems with Aguirre's conduct, because he gives employees more leeway with conduct than with performance problems.

SEC/13498
RECEIVED
2005 OCT 11 PM 3:44
OFC OF THE CHAIRMAN

GARY J. AQUIRRE

October 11, 2005

Via Facsimile to 202-772-9200 and Regular Mail

Chairman Christopher Cox
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549

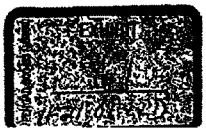
Re: Request for Preservation of Documents

Dear Chairman Cox:

You may recall my letter of September 2, 2005, in which I contend the Division of Enforcement ("Enforcement") terminated my employment for unlawful reasons. Among those reasons was the fact that I objected up the chain of command about the special treatment Enforcement was giving John Mack because, as my supervisor explained to me, he has "powerful political connections."

I now have reasons to believe that senior Enforcement staff members are tampering with Commission records to justify my termination. On September 19, 2005, I obtained what Enforcement and Human Resources told me were complete copies of my personnel files. However, key documents were missing. After repeated requests, Enforcement provided additional documents to me on October 6. These documents fall into two distinct categories. First, there are those that Enforcement routinely generated in connection with the evaluation of my work, just as it does with all other staff. These include the Performance Plan and Evaluation for 2004-2005, the Performance Assessment for 2004-2005, and my Branch Chief's specific comments evaluating my work for the same period. Without exception, these documents demonstrate my work met or exceeded all Commission standards. Based on these records, the compensation committee determined my 2004-2005 work justified a two-step pay increase, which you approved.

But another putative evaluation of my work for the same time period has found its way into in my Enforcement personnel file during the past week. This one was prepared by my Assistant Director, Mark Kreitman, at the suggestion of Associate Director Paul Berger. According to Enforcement's transmittal memorandum, Mr. Kreitman's evaluation "mistakenly did not go to the compensation committee." Curiously, Mr. Kreitman's evaluation is dated September 26, 2005, three months after my Branch Chief submitted his evaluation to the compensation committee, more than a month after the compensation committee acted, more than three weeks after Enforcement fired me, and one week after I requested my personnel file. In short, it was not prepared in the ordinary course of events.



The bottom line is this: since lawful grounds do not exist for my termination, senior Enforcement staff is retroactively creating fictitious ones. The fact that senior staff is willing to retroactively paper my file to justify my termination raises serious concerns regarding the integrity of my personnel files as well as all other documents relating to my work with the Commission. Put differently, if documents can retroactively be added to my personnel files, other probative documents may vanish.

I am therefore requesting that you instruct Linda Thomsen, as the Director of Enforcement, to direct Enforcement staff to preserve all memorandums, emails and other documents, as that term is used by Enforcement, relating to my employment and work with the Commission. These records will be critical for the courts and other governmental agencies to determine if Enforcement violated federal law by firing me.

Very truly yours,

Gary J. Aguirre

CC: Paul S. Atkins
Roel C. Campos
Cynthia A. Glassman
Annette L. Nazareth
Linda Thomsen
(By fax and Regular Mail)

[redacted] • WASHINGTON, DC • 20009
PHONE: [redacted] • FAX: [redacted]

Andrews, Kelly J.

From: Lennox, Jill
Sent: Wednesday, May 24, 2006 3:17 PM
To: Andrews, Kelly J.
Cc: Egbert, Nelson N.; Sullivan, Mary Beth; Robinson, Lolita I.
Subject: RE: audit issues identified in closing memo

thanks kelly - can you put a copy of the closing memo on my desk. I'm back on July 10th - can it wait util then? if not, I can work on it from home - atleast I'll get some additional hours in.

I know lolita is retiring in july so I assume she will not get to this? let me know - I don't want to step on her shoes.

nelson - is this worth doing an audit on? memo??

sorry for all the lowercase - I'm holding and feeding abbey w/one hand and typing w/ the other. James is napping, thankfully!

jill

From: Andrews, Kelly J.
Sent: Tue 5/23/2006 3:51 PM
To: Lennox, Jill
Cc: Egbert, Nelson N.; Sullivan, Mary Beth
Subject: FW: audit issues identified in closing memo

Hi Jill,

Sorry to bother you while you are on maternity leave; hope you and Abbey are well. A while back I referred an audit matter to Lolita. Since it arose in an investigation we did involving the Division of Enforcement (and Lolita said that it is currently on hold) Mary Beth suggested that I also refer it to you. At the end of this email I excerpted the findings that we referred to audit staff. As you will see, we found problems in the merit pay system. Let me know if you want to discuss this or you want a copy of our closing memorandum in that matter.

Take care,

Kelly

From: Robinson, Lolita I.
Sent: Thursday, May 18, 2006 2:24 PM
To: Andrews, Kelly J.
Subject: RE: audit issues identified in closing memo

I am not sure it is on hold.

From: Andrews, Kelly J.
Sent: Thursday, May 18, 2006 2:16 PM

C000542

To: Robinson, Lolita I.
Subject: RE: audit issues identified in closing memo

OK. Does the audit staff still plan to look at these issues at some point?

From: Robinson, Lolita I.
Sent: Thursday, May 18, 2006 2:15 PM
To: Andrews, Kelly J.
Subject: RE: audit issues identified in closing memo

This was one of the issues for the labor relations audit but we did not get that far.

From: Andrews, Kelly J.
Sent: Thursday, May 18, 2006 2:12 PM
To: Robinson, Lolita I.
Subject: FW: audit issues identified in closing memo
Importance: High

Hi Lolita.

What is the status of these audit issues I referred to you at the end of last year? We have to brief Congress on Monday, and Walt wanted me to check.

Thanks,

Kelly

X16038

From: Andrews, Kelly J.
Sent: Tuesday, November 29, 2005 3:21 PM
To: Robinson, Lolita I.
Subject: RE: audit issues identified in closing memo

That footnote is it, unless you need more information. Thanks.

From: Robinson, Lolita I.
Sent: Tuesday, November 29, 2005 3:15 PM
To: Andrews, Kelly J.
Subject: RE: audit issues identified in closing memo

Kelly, auditing is my life. Feel free to send me any information that you think will be helpful.

Lolita Robinson

Office of the Inspector General

[redacted]

C000543

From: Andrews, Kelly J.
Sent: Tuesday, November 29, 2005 3:10 PM
To: Robinson, Lolita I.
Subject: audit issues identified in closing memo

Hi Lolita,

Below is a footnote from a closing memo I wrote that Walt and Mary Beth signed today. While we found no misconduct, we found a number of irregularities related to the merit pay process, specifically related to a supplemental evaluation that was prepared for an employee. Let me know if you need further information, once you start to work on this. I know you have lots of audits to do.

Take care,

Kelly (x16036)

> "We found several irregularities with the supplemental evaluation including: it was not dated or signed; it appears to have been created after the merit pay calendar deadline; it was not sent to, or considered by, the compensation committee; it was not in Aguirre's employee personnel file (EPF); and it was separate from the initial evaluation written by Aguirre's immediate supervisor, who should be the only one who prepares a summary on behalf of each employee, according to the merit pay process guidance. We are referring these issues to the audit staff."

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11/06/2006 04:43 FAX 2027729250 001/007

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Washington, D.C. 20549-0601

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(F) 202.772.9650

Facsimile Transmission

Office of: To: Jason Foster & Nick Positaly

Attn: Fax: [redacted]

From: Jane Cobb Date: Number of Pages: 6 total

☐ ORIGINAL WILL FOLLOW VIA. ☐ REGULAR MAIL ☐ OVERNIGHT DELIVERY
☐ HAND ☐ OTHER
☐ ORIGINAL WILL NOT FOLLOW

Supplemental Message:

Attached are emails, attachments, & file information that Lindy just brought to me pursuant to our conversation.

Jane [redacted]

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[redacted]

Hardy, Melinda

From: Kreitman, Mark J.
Sent: Monday, August 01, 2005 12:13 PM
To: Hanson, Robert

Attachments: 8-05 Supplemental Evaluations.doc

8-05 Supplemental Evaluations....

Supplemental Evaluations:

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Swanson: Rob puts in long hours, takes advantage of expertise available throughout the Commission, and develops creative investigative models. He occasionally has difficulty, however, working within a structured organizational framework and fails adequately to consult his supervisors with respect to tactical and strategic decisions. For example, he has dispatched subpoenas without first clearing them with his branch chief, and taken legal positions without full consideration of conflicting decisions.

Filename: 8-05 Supplemental Evaluations.doc
Directory: C:\Documents and Settings\HardyM\Local Settings\Temporary Internet Files\OLK38
Template: C:\Documents and Settings\HardyM\Application Data\Microsoft\Templates\Normal.dot
Title: Supplemental Evaluations:
Subject:
Author: kreitmanm
Keywords:
Comments:
Creation Date: 08/01/2005 10:54:00 AM
Change Number: 1
Last Saved On: 08/01/2005 12:12:00 PM
Last Saved By: kreitmanm
Total Editing Time: 79 Minutes
Last Printed On: 11/06/2006 4:23:00 PM
As of Last Complete Printing
Number of Pages: 1 (approx.)
Number of Words: 256 (approx.)
Number of Characters: 1,460 (approx.)

Hardy, Melinda

From: Hanson, Robert
Sent: Monday, August 01, 2005 1:14 PM
To: Kreifman, Mark J.
Subject: RE:

Attachments: 8-05 bob changes.doc

8-05 bob changes.doc (33 KB)

From: Kreifman, Mark J.
Sent: Monday, August 01, 2005 12:13 PM
To: Hanson, Robert
Subject:

<< File: 8-05 Supplemental Evaluations.doc >>

Supplemental Evaluations:

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. He is willing to go the extra mile. But he is resistant to supervision and insufficiently aware of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he issued required retraction to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency (don't think we should allege if it only raises a question). His desire to maintain complete control of his investigation seems to preclude full and open sharing of information with others. He has difficulty explaining the significance of evidence his investigation uncovered in a clear and well-organized manner and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Rob puts in long hours, takes advantage of expertise available throughout the Commission, and develops creative investigative models. He has excellent analytical skills. He has difficulty, however, working within a structured organizational framework and fails adequately to solicit his supervisors with respect to tactical and strategic decisions. For example, he has dispatched subpoenas without first clearing them with his branch chief, and taken legal positions without full consideration of conflicting decisions. Often he seems to focus on individual interests rather than soliciting others' input to ensure shared understanding of priorities and concerns.

Filename: 8-05 bob changes.doc
Directory: C:\Documents and Settings\HardyM\Local Settings\Temporary Internet Files\OLK38
Template: C:\Documents and Settings\HardyM\Application Data\Microsoft\Templates\Normal.dot
Title: Supplemental Evaluations:
Subject:
Author: kreitmanm
Keywords:
Comments:
Creation Date: 08/01/2005 1:13:00 PM
Change Number: 2
Last Saved On: 08/01/2005 1:13:00 PM
Last Saved By: US
Total Editing Time: 3 Minutes
Last Printed On: 11/06/2006 4:33:00 PM
As of Last Complete Printing
Number of Pages: 1
Number of Words: 311 (approx.)
Number of Characters: 1,777 (approx.)

U.S. SECURITIES AND EXCHANGE COMMISSION
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Washington, D.C. 20549-0601

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Facsimile Transmission

~~Office of~~ To: Jason Foster ; Nick Positely

Attn: Fax: [redacted]

From: Date: Number of Pages: 3 total

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Supplemental Message:

Per our conversation —

[redacted]

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Evaluation of Gary Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chef, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Filename: Evaluation of Gary Aguirre
Directory: C:\Documents and Settings\Administrator\Local Settings\Temporary Internet Files\OLK182
Template: C:\Documents and Settings\Administrator\Application Data\Microsoft\Templates\Normal.dot
Title: Evaluation of Gary Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work
Subject:
Author: kreitmanm
Keywords:
Comments:
Creation Date: 9/29/2005 12:15:00 PM
Change Number: 1
Last Saved On: 9/29/2005 12:15:00 PM
Last Saved By: kreitmanm
Total Editing Time: 0 Minutes
Last Printed On: 11/6/2006 12:50:00 PM
As of Last Complete Printing
Number of Pages: 1
Number of Words: 179 (approx.)
Number of Characters: 1,021 (approx.)

U. S. Securities and Exchange Commission
Performance Plan and Evaluation

[redacted]

Name	From Month	From Year	To Month	To Year
Aguirre, Gary L.	10	2004	04	2005

Title: General Attorney(s)

Division/Office/Field Office: Enforcement

Pay Plan, Series, Grade, Step: SK- 0905 - 14 - 24

Period Covered by this Evaluation
- ☐ Entire Performance Evaluation Period
- ☐ Detail (From:_____To:_____)
- ☐ Other (specify)_____

[redacted]

Employee Signature	Date 11/1/04
Supervisor/Rating Official Signature	Date

[redacted]

Employee Signature	Date
Supervisor/Rating Official Signature	Date 4/1/04

[redacted]

Employee Signature	Date 6/1/05
Supervisor/Rating Official Signature	Date 6/1/05

[redacted]

- ☒ Acceptable
- ☐ Unacceptable

SEC 2494 (5/03)

[redacted]

Critical Elements and Acceptable Standards	Results	
	Acceptable	Unacceptable
Knowledge of Field or Occupation - Maintains and, with few exceptions, demonstrates technical skills essential to performing duties of the position, including knowledge of pertinent laws, standards, regulations, rules, policies, procedures, and technologies.	☒	☐
Planning and Organizing Work - With few exceptions, recognizes and solves problems, meets objectives, and considers priorities when planning work assignments. Efficiently uses time and resources to produce a quality product with appropriate guidance and completes assignments within agreed upon time frames.	☒	☐
Execution of Duties - With few exceptions, thoroughly and carefully analyzes and researches assignments. Effectively applies necessary knowledge and technical skills in order to perform duties of the position in an acceptable manner. Final work products meet established need, reflect appropriate attention to detail, and are well organized.		☐
Communications - Oral and written communications further agency objectives and, with few exceptions, are clear, concise, well organized, accurate, grammatically correct, and appropriate for the intended audience. Required personal interactions with internal and external constituencies/ counterparts are generally responsive to the needs of these individuals or entities. Keeps these entities and management apprised of relevant issues, changes, and problems as directed.	☒	☐

SEC 2494 (5/03)

Podsiadly, Nick (Finance-Rep)

From: Lari, Rita (Judiciary-Rep) [Rita_Lari@judiciary-rep.senate.gov]
Sent: Wednesday, February 14, 2007 12:28 PM
To: Podsiadly, Nick (Finance-Rep)
Subject: FW: REMINDER: Department of Justice budget briefing today at 3:30, SD 226

From: Neal, Kathryn (Judiciary-Dem) [mailto:Kathryn_Neal@Judiciary-dem.senate.gov]
Sent: Wednesday, February 14, 2007 12:26 PM
To: Virkstis, Matthew (Judiciary); JudicBiden; JudicBrownback; JudicCardin; JudicCoburn; JudicCornyn; JudicDurbin; JudicFeingold; JudicFeinstein; JudicGraham; JudicGrassley; JudicHatch; JudicKennedy; JudicKohl; JudicKyl; JudicLeahy; JudicSchumer; JudicSessions; JudicSpecter; JudicWhitehouse; Pagano, Ed (Leahy)
Cc: Berry, Jessica (Leahy); Cota, Greg (Leahy); Dowd, John (Leahy)
Subject: REMINDER: Department of Justice budget briefing today at 3:30, SD 226

From: Virkstis, Matthew (Judiciary)
Sent: Monday, February 12, 2007 6:14 PM
To: JudicBiden; JudicBrownback; JudicCardin; JudicCoburn; JudicCornyn; JudicDurbin; JudicFeingold; JudicFeinstein; JudicGraham; JudicGrassley; JudicHatch; JudicKennedy; JudicKohl; JudicKyl; JudicLeahy; JudicSchumer; JudicSessions; JudicSpecter; JudicWhitehouse; Pagano, Ed (Leahy)
Cc: Berry, Jessica (Leahy); Cota, Greg (Leahy); Dowd, John (Leahy)
Subject: Department of Justice budget briefing

The Department of Justice will brief interested staffers on its FY 2008 budget proposal on Wednesday, February 14 at 3:30 p.m. in the Judiciary Committee hearing room, SD 226.

Thanks, Matt

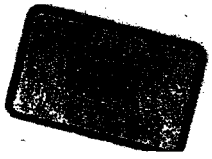
Williams, Betty J.

From: Kreitman, Mark J.
Sent: Monday, August 01, 2005 6:17 PM
T : Fielder, Dave
Subject: supplemental evaluations

Attachments: Supplemental Evaluations 2.doc

Dave – Paul has asked for supplementation of these two evaluations. Please let me know if I should make any changes. Thanks. Mark

Supplemental Evaluations 2.doc...



Supplemental Evaluations:

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. He is willing to go the extra mile. But he is resistant to supervision and insufficiently aware of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he issued required retraction to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His desire to maintain complete control of his investigation seems to preclude full and open sharing of information with others. He has difficulty explaining the significance of evidence his investigation uncovered in a clear and well-organized manner and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Swanson: Rob puts in long hours, takes advantage of expertise available throughout the Commission, and develops creative investigative models. He has excellent analytical skills. He has difficulty, however, working within a structured organizational framework and fails adequately to solicit his supervisors with respect to tactical and strategic decisions. For example, he has dispatched subpoenas without first clearing them with his branch chief, and taken legal positions without full consideration of conflicting decisions. Often he seems to focus on his personal interest in aspects of his investigations rather than soliciting others' input to ensure shared understanding of priorities and concerns.

Paul –

I share your concern about the low stats we anticipate my group to generate this fiscal year, and hope and expect that next year we'll be significantly more productive. I would like, though, to express a thought in this regard. Both Linda and you have suggested several times that this group should not be not substantially different from others in its ability to produce results. My, admittedly anecdotal, exploration leads me to the belief that the contrary may be so.

In the 18 months since I assumed this position, my group has operated under handicaps which to my knowledge are unique in the Division:

(1) Attorneys Lost: two branch chiefs (Wiggins, Moore); eight staff attorneys (Martin; Sullivan; Anderson; Rosenfeld; Gardner; Neal; Mayor; Jarsulic);
(2) Attorneys Absorbed: one branch chief (Fielder); nine staff attorneys (Jarsulic; Miller; Smith; Eichorn; Van Meter; Fielder; Swanson; Aguirre; Tankel) – the last three as a result of their difficulties working in other groups, last two plus Fielder with significant (and in Aguirre's case) total time commitments to work brought over from their prior groups;
(3) Unproductive Attorneys: seven staff attorneys (Besse, Gardner, Davis, Sullivan, Anderson, Eggert, Davis), one counterproductive branch chief (Moore);
(4) Attorneys Detailed: two staff attorneys (Neal to another group, Rosenfeld to Europe [seriously limiting his productivity]);
(5) Cases Completed But Derailed: four settled mutual fund cases.

[From Weitnauer 4-05
deleted Jens Fielder
- on list, fwded 4/22/05
~~regulars or other~~
~~whom electronic~~
~~reserve~~

11/14 Aguirre interview [redacted]
2yr pm meet. Hanson follow up interview EOOQ387

3pm (1) Did you tell Aguirre or anyone that it was very difficult to obtain approval to take Neale's testimony b/c of his powerful political connections
political matter
re part
ref [redacted] no typing to say like up ducks in a row when taking
say in e mail typos
no confusion
well represented
proceed cautiously let there above him
great deal of confusion after test; didn't sink in
red ended kind up
dvcs w/ Kretzman, Paul & Linda come [illegible] accdtd
(2) Was the rating period extended for this group, did Aguirre dread this past year? If so, til when?
not before 6/27 likely
any ext? doesn't know
found Word doc ~~for~~ dated ~~6/27~~ kept edits to thinking
name of file ~~6/27~~ changed says 8/5 to 8/6 no changes
11:48 back to Mark 12:13
(3) When did Aguirre quit for the 2nd time? In writing?
1st time - 2 mos after moving to DC, said might leave
came back 1-2 days
2nd time - paid resigning July 31st Paul
later changed to be off Sept, then Dec...
month & 1/2 notice
(4) Who wrote the supp eval of Aguirre.
initial

C Did you discuss w/ Aguirre his problems/weaknesses? When? Documented?

Mark Randling & ~~believe~~ Mark w/ say he did have disc.

*2 made comments to Kreitman by e-mail
believe went to Paul. doesn't have
knowledge Paul
apologized to Paul & regret (not as candid as needed)
went & told Kreitman that we needed to do that
Kreitman went on to Paul.

I guess done for July
doesn't see in e-mail.

Hayson wrote all other evals except Aguirre & other prod. employee
heavy input on all evals.

FYI

still haven't found if Mac had access but may talk to anyway

list of 10 - 12 pot. tippers

Bob Hanton call back -
clarify Linda's involv.
Paul, MK & Bob talked to
Linda when Tim GA
s/we take his test now
MK said w/ love to take test
w/ not stay away for. not sure
Paul said old
most are high ranking offs.
all in agmt
invr. process
(2) Linda's comm w/ White
heard for someone had contacted
Linda
around time MS being Mack
did not give them anything
context

10/25 Linda Borostovik [redacted]

meets (out 10/14 Tues, Thurs 9 Tue)

Mark sent to Chuck

Chuck asked if s/b included in personnel file

Stanger called Linda +

merit pay process
normally during summer

if accept, ~~supr~~ supr cont
normally zimmer supr

understood Kreitman supr of 6A
not Hansen
not involved in merit proc.

told by Chuck Hansen went

Chuck said Kreitman

9/30 e mail
wanted to know if given to him
curious whether got
when after fact?

LOOOO91 →

email 10/6 mailed encl EPF Chuck & GA

w/ have gotten

all sudden e mail fr Kreitman

GA mtg & Chuck

don't know w/ have.

thought supr sent + emplee sent w/ merit pay & emplee entitled to those who when rating given emplee sent & supr sent if grievance & use as evid. comp comm rules on

email 9/21 Clampitt wanted info re rating Chuck to Markell (Enf.)

encl SF & something diff? not sure Clampitt off. representing

merit pay not grieving

wanted clarif on why came up all sudden

EOOO392

10/24 Kreitman mtg.

1. preferential treatment of Mack
   a. Rotatestimony
   b. call to Linda
   c. "Long March" award? to Aguirre?

2. compared w/ personnel file
   a. post-term. memo
   b. 1. who prepared?
      2. why?
      3. when?
      4. why no date?
      5. did Aguirre receive
      6. why Kreitman eval?

x4484

~~10/25~~ 9/26/05

5:45 pm

eval was 2 pieces:
1. initial eval. to Berger when rec'd end of June by Hanson
2. Kreitman did suppl.
   f/c did not address problems

Aug. 1st forwarding to Comp Comm.

learned later upon ring on by Hanson went to Comp Comm.
error.

both sent to Paul

LOOO393

didn't think could critic w/ there
for another staff Rob Swanson

suppl.
Word shows date
may have disc w/ Berger
sure w/ Bob

rates BC + para prof. + staff att.
don't know if GA rec'd suppl write up
did have mtg w/ BC + staff att +
discuss wk
give copy of written eval
tell them step inc.

not w/ Mary + /c gone.

Knew GA
student at Grinn 2LM
edited law review and publ.
friends wife + Kurt at Chavez.

L000394

diff Asst Dir Shaw

yes

dec. made by Berger.

Berger asked if MK knew whether went to comp comm

don't know

Berger ckd & no it didn't

s/go into personnel file

Bonasdonity

& Hardy in GC

some confusion

conflicting advice

2 steps?

concur w/ 2 steps

eval. based on wk & effort

leeway @ conduct

conduct more I w/ G.A.

worked out well in Berger pass instructions

brought forward

0000395

compl. diff case

see if manageable
5 wks GA suggested
then unclear

became clear couple prob w/ how being invest

resist. to supers. mostly BC

subp w/out going to BC
as phys
ind. crim stat recalled

not conducted in org prof.
who had access
comm

GA gathered millions of e-mails
hoping to find smoking gun

John Mack -

didn't have ouff evid to call in
can't call in citizens on unfounded susp.

only = friend of Sanders (hedge fund)
not enough

E000396

still don't have evid even after more invest

2000397

Mack may be tipper

ill. insider trading
5 potential tippers
haven't called in any of 5

serious matter to call in for test.
in fraud inv.
don't do lightly.

pointless if no info didn't tip

stand practice = nail down story
as much as poss.

Thomsen on down
gen regarded as most aggres.
trial Lawyer & AUSA Div.

took Senator Harris
case ag trustee of mutual funds
Kissinger

hardly afraid of taking down anyone
Berger & Bob & MK - numerous disc.

34m looks dirty but Drew knows @
little out of ord. for WH to contact Thomsen

Linda called MK & said corresp.
MK said OK come & get. &
subp?
not uncommon when someone prominent
looked at
intervene

award
laughed
joke
xerox of Nixon face
6/4 went to visit of SONY Visit in Pequot
case
talking in non-linear fashion
sign. act.
report very inf.
pleased
8½x11" Rayban Beer face.
MK fired by telephone
required b/c in Calif.
never fired anyone
friends as of summer. L000398
unhappy at wh but party summer
on

explaining over & over

felt invest being thwarted
test. of March
subp March for bank & brok records
↓
onerous; expensive

not going thru channels

said wanted to report directly to MK

becoming unmanageable

staffed more heavily than in Assoc
Upp
several atty att
interns
paral,

Consensus: Linda, Paul, Bob & MK
retain her off

sending → term ltr.
MK drafted

sole practr.
refused to wk in structure
poss dangers for Comm.
loose cannon
threatened to resign

EOOOO99

clear didn't need fin.

w/ leave once invest done & w/ not write up

uncoop w/ other 2 attorneys
disrespect
unwilling to bring in heart of case
" to take resp for Hanlon.

complaint for Berger opposing counsel

10/25 follow up

mcld resp to 9/30

10/21
10am

Paul Berger

Kevin O'Rourke (Comm employee)
rep folks in IG proceedings

insider trading

Gary Aguirre opened invest.

&

AD Shriver gp
supv

reported @ Pequot over years

found gd

went to Kreitman's gp

kept K & Hanson involved

not much

got a mail fr Gary

wants to take Mack test.

went to Mark K.

excellent lawyer

might now no evid Mack involved

try to limit case

some things pt in his

get subp out & get hard evid.

E000101

no telephon records

our docs in right away, but
those ups always
will deny ins trader, then
what

build case then take test.
likely take test

E-1 w/ GA
said covid but didnt say that
not much confid in GA wb.
4-5 times came to tell about can
feel touch
VP test.
not afraid to take test of high places
suppositions, not facts
gave memo in compact
never gave 2nd memo

lots of e mails
didnt keep all
most just to Berger
memos.

ending memo of e mails →

E000102

likely told but just better to build
case 1st then talk to.
w/ facts.

Dalia exp & jlmt call
say conspiracy.
if told won't to take - let's do
lawyer called to ask what the heck
deny
say reasons
1st e-mail after back & forth
long & troubled invest
Gt came in thinking while in vest
w/out supr
subp violated ECPA
another ? another ask
w/ not go to supr
did not know rules
calls for counsel compl @
violative diff.
Pollack complained.
walk out & leave & not come back
at least reason.

E000103

assigned 2 attorneys to case
MK & Bob outstanding

dupi contrib stmt
Kreitman came to Berger.

BC wrote
convers w/ Bob Hansen
make sure const critic
really nice
being driven crazy
fantastic job
before July tell this guy straight what I am
OK - writing talk to MK @ what
on comp. comm. to say

tremend. contact w/ MK.

wrote up piece
lack of comm.
put in rep. paper
put in file cont. stmt
not sure other piece of paper in file

LO00134

clerk

saw sep paper before comp comm.
there a pt of
Make sure get into dismt
don't know why separate
did for someone else Rob Swanson. Bob Hansen supi
Constructive criticism
thought Bob wrote
Berger asked Maybe whether in record
can't remember when convers.
maybe after term.
Check send e-mail said GA
wanted file & said fine
someone asked @ conf. stmt
+ piece of paper
are both in file?
Bob wrote conf stmt.

E000105

lot of convers w/ NR re GK
Linda Brookmont.
concerned @ whether dep paper c/b
in file
thinks called LB
asked if OK to do.
said fine put in along w/ cover
Sent.
Bob & him had 1 hr convers
feeling sad
can't not be straight
if tell this things may get worse.
thought Bob was going to vomit
left 2 steps up to MK & DK
surprised
why 2 w/ all prob?
long hrs, late, typing even
though driving crazy
before July
Why term.
got worse after that

L000106

L000107

MK came to Berger & said end of yr & said I'll end@term.

I then talked to Bob later

I think about
talked to Linda maybe w/ MK+BH
go ahead

I think@ more
make sure all

become so diff to wk w/
w/ not w/in supr structure or
w/ others
other staff att'y
outside counsel
trial counsel Newsp at

too hard to wk w/
w/ not under them

after GH said resignin'

GH came into Berger's off & said
resignins end of Sept when
case wrapped up

miss not fully apprec of reality
Rich com. betw. & said not remaining

Theirs sought guidance HR before 68 term.

10/21
9:30 am

Linda Thomsen

L000109

1. preferential treatment of John Mack in investee: CEO of Morgan Stanley

subp. for docs to Morgan Stanley
Mary to White

normal protocol?
use

info in decision re: taking test of Mack

e-mail fr Aguirre re: ?

2. evaluation & rating of Aguirre

info. to compens. comm.?

involvement fr time & time heard from Burger that disagmt among time.

Mary Aguirre Is w/ pers. stake & inept to take test at a part. in Stone Bob, Mark & Paul all thought then

L000110

didn't make sense the docs
dec struggled w/ all the time

percep. no thinking that high profile
now is not the time.

direct comm w/ GA ?
cryptic e-mail re: open door
talk@case

team: Request GA for Bob Mark
Paul & staff att. (2)

Hilton Softer? retired knees@case

did not come
some time reply & the effect no need.

personnel status -
terminated
believe Bruins SEC not hiring

in 1 Asst Dir. pp
asked to be moved to McKnight.

knees@ move
Paul decided to move.

info MK's group GA was raising
Is w/ cases time to pursue EEO,
leaving b/c no need to wk

high maintenance
unhappy before & after move
Kittman friend

Mack -
got copies of Chairman ltrs.
ref. to
out of sequence.
during vetting process White rep Mack
wanted assurance & didn't give
out standing doc req. & pulled
together
sent docs to Linda -
people call Thomsen all the time
sensitivity of I.
told being invest.
White clear none meant to effect inv

L000111

eval

sign off on ratings

~~was~~
prob.

Used to be on comm.

May have acted @ GA s/c hist.
s/c "2"

Thought yr can do really good work &
~~+ mark~~

diff & manage & diff wl peers

invest wh solicit.

9/24 memo
Chuck Sharpe told Linda wanted
to add to file

make sure file reflects when came
in.

note history.

nothing @ E000112

Paul may have said record complete.

Paul, Mark & Bob Conners re 1 term

GA subm resign or clearly said leaving & then changed mind close to end of proc

accelerated dates of review d/c shifting time

4 met in aff.

10/17 Robert Hanson call [redacted]

② Evaluation of Aguirre '04-05
steps recommended?
when?
personnel file on Aguirre
Kreitman memo dated 9/26?

① Ho 9818 witness.
prof treatment of potential w/ testimony
John Mack
Hoff att. wanted to take test.

notice of rights

10th Mess.

active
began last Oct-Nov. '04

Mack not taken

Mack to be taken in future
insider trading case
potential tippers
Mack potential tipper

2000114

Hary Aguirre wanted to take test
lots of dialogue @
potential source
& felt compelling
lots of disc. re test.
whether Mack had access
very old info - '01
potential leads
hedge fund w/ many parties
decides in new 1st
access motive normal proced.
old conduct
summer '05
others inv.: Hary & Lin, staff att.,
Kretman, Assoc Berger
2 others:
Lee Ban-Jarma (new & comm.
Jim Eichner (new comm)
Thomsen - yes
I re Mack test.

C0001115

subp for docs
several B/Ds.

White called Linda directly once

Mack started to wk for Pequot Co.
entity named in F.O.

Ken & Morgan Stanley

folks who have access to Monsen do
e-Mails lots

getting pending

when do you want to take this.

whether
access to info. they Mack was open I
(re trade disc. w/ at B/D)
banking & Mack gal friend

lots of potential tippees

told Mary need to let know to give head
up

I of Mary issuing subp. int. provid
ag Enf policy
supers. I broad subp

LOOO116

ak o o

E000117

Mary Lynch got req fr Mary to
keep cafe confid.

Mary called Paul

term during prob.
didn't work well w/ others
writing poor
didn't comm well.
some gd ideas
serious mistakes

Chuck Steiger

open I

rated him pass recomm steps

Came to Navy Jan/Feb. - Sept
after another opp

talk to EEO counselor d/c action ag.

quit 2 times
then said left in middle of day

told him said leaving at end of Sept
only want to do part of invest
assigned someone else
last straw

rated pass after 2 mos Apr 30 or Mar 30

some messiness
developed after that pt.

2/24 memo don't know.

at some pt Berger said complaint
@ Kreitman
if Hary source may want to document
troublemakers

perf disc w/ Berger re: Hary Aguirre
be honest in eval.
suggested suppl. Kreitman @ around 7 or 8/05
before term.

Kreitman friends before & after
taught at Devry

used himself as copartner of Mark

Hary & Kreitman didn't exercise eye
complain @ Mark
yell at Mark.

LCCC118

only case Hary assigned K.:
getting event re Berger re Thomsen
Hary came running in Kreitman not

allowing him to take Mack's test.
still up in air re: Mack test.
susp to 1st Boston and Sanders
Paul asked Mary to take Mack test
diff. versions of memo & Hansen
some assertions not true in memo.
filed case ag SEC alleging disc
Mary told Hansen
age disc.
22 terms applied
21 terms denied
@ 65 yrs old looks much younger.

memo in e-mail
forwarding e-mails to me

10/6 Richard Hurwat + Sam Fortstein

want to respond + do inquiry
fired b/c a/not follow directions
ltrs of resign + rescinding
prob period, last period
suspect nothing there.
respond after ut.

23 diff positions + got 24th.

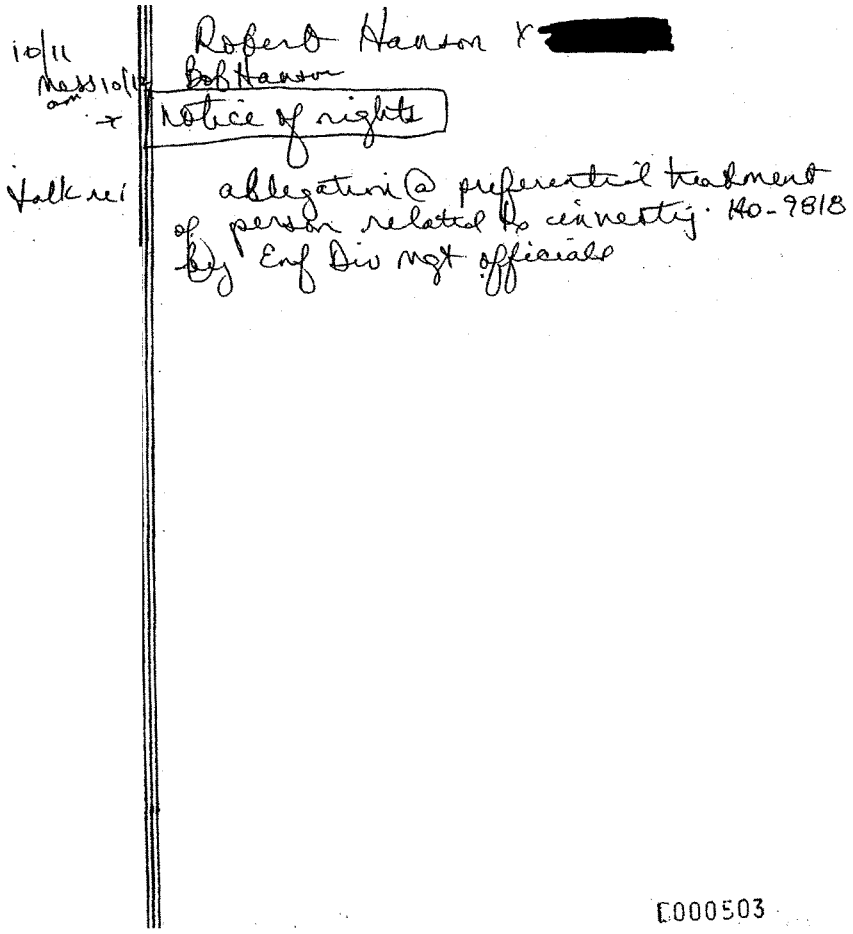
hiring + firing - Kreitman
professor at
6 Town

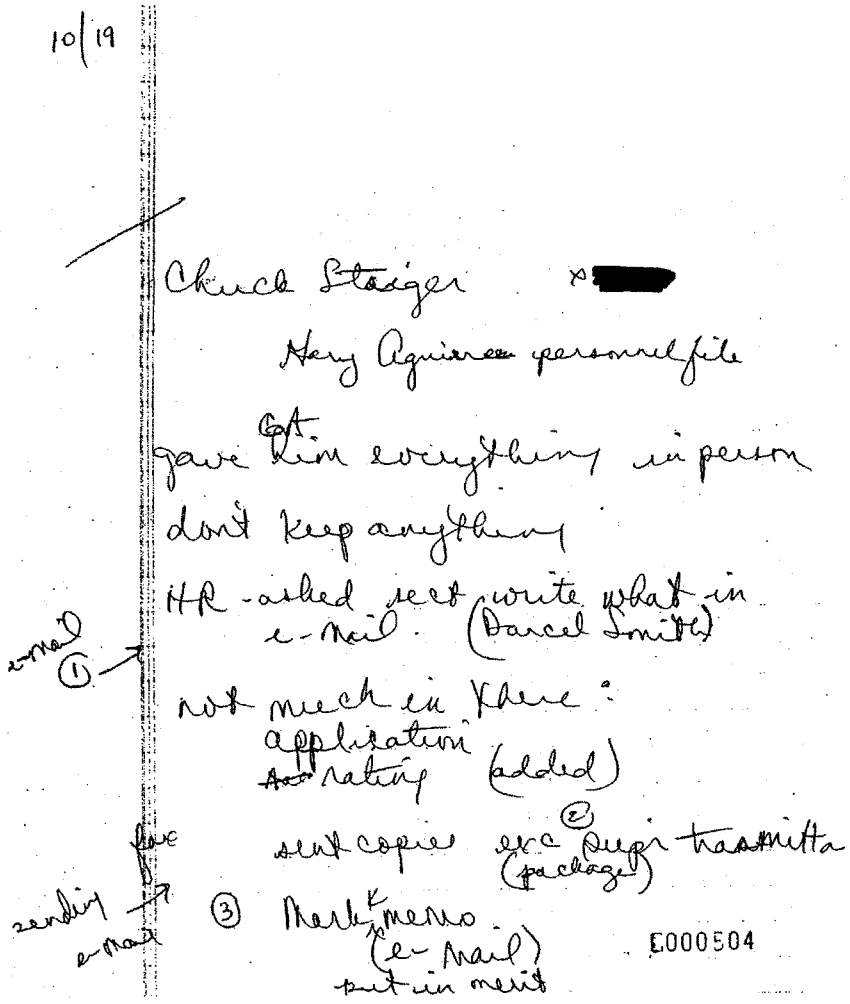
will off.
pursuing 2nd case
EEOC dismiss/dmt.

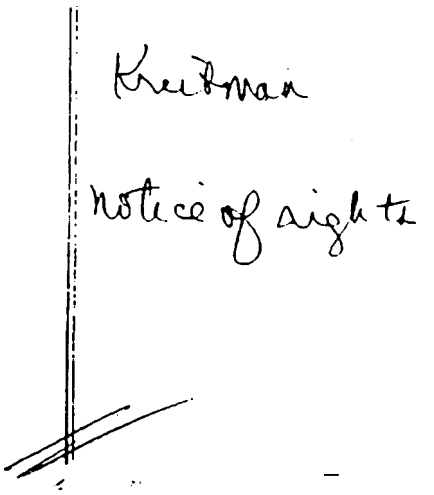
E000501

Sent.
10/12 Esquire
New ltr w/ slightly diff take
10/11

E000502


10/11
Robert Hanson [redacted]
Bob Hanson
Notice of rights
allegations @ preferential treatment of person related to cinematg. HO-9818 by Enf Div ngt officials
E000503


10/19
Chuck Staiger x[redacted]
Navy Aquirees personnel file
gave him everything in person
dont keep anything
HR asked sent write what in e-mail. (Darcel Smith)
e-mail ①
not much in there:
application
rating (added)
sent copies ② (package)
fax
sending e-mail
③ Mark K memo (e-mail) put in merit
E000504


Kreitman
notice of rights

Kreitman x [redacted]

Mtg. 10/30

notice of rights

~~Facts~~

(1) allegation of preferential treatment of person related to investigation re: ~~theft~~ of certain securities HQ-7818 by Eof Dis Mgt officials

John Mack testimony?
involvement in invstg?
Know Harry Aguirre? How?

(2) evaluation of Aguirre
when
why

sign
Counsel w/ him

C000506

Paul Berger × [redacted]

notice of rights

Linda Thompson × [redacted] direct

notice of rights

mess.

C000507

e mail

B. Cunningham e mailed Chucd
doesn't remember

doesn't remember talking to Kreitman
thinks coord w/ Chucd

notes?
items.

involved w/ term
shortly after on board 11/29/04
having concerns
talked prin w/ Berger

Chucs notes & e-mails

conduct - prob.

I - ~~Term~~ conduct

E.000508

prob period not good fit
CFR allows for resign.

no advice given during merit process.

not told given 2 steps & conduct separate

didn't see conflict

Mark Kuhlman

rec'd e mail verbally transmitted substance of eval.

# of times verbally, not in writing

twice mtg w/ staff

1. reviewed

2 after stepping to give written eval + copy of our cmt. sent

date of 1st mtg?

not sure might have been Boo.

during acting period dec Is.

E000509

Aguirre follow up Qs:

1. Check:
   Clampitt coming to off on 9/21 asking
2. did Aguirre ask Kreitman why not on file

Acquire invest.

Is:

① prof treatment to Mack
Hanlon
Berger
Klonsen
Greitman

② tampering w/ Acquire's personnel file
creation of 9/26/05 supplemental evaluation

Not [illegible] Acting process problems:

1. termination
   a. HR may not have been consulted to/ crimd. before
   b. no 30 day notice given
   c. no documentation of warnings (not up incl; 1st not) re: Dating

2. EPF
   a. missing suppl eval.
   b. suppl eval ~~may~~ created 9/1/05, perhaps after rating deadline & not given to comp com
   c. Emp did't keep copy after given to Acquire

3. evaluations
   a. not dated or signed
   b. not in EPF
   c. not given to employee
   d. not timely, unless ext given
   e. 2 diff ones

4. reassignment diff eff & actual dates

C000511

10/31/01 Aguirre viewed file:

Q's re:

1. 30 day notice req'd
2. supp goals have been in EPF
3. signed eval created after deadline, not given to compensation comm. unless extended.

5. reassignment w/in gps eff 3/20/01 but moved 11/01.

6. HR may not have been consulted til just before term.

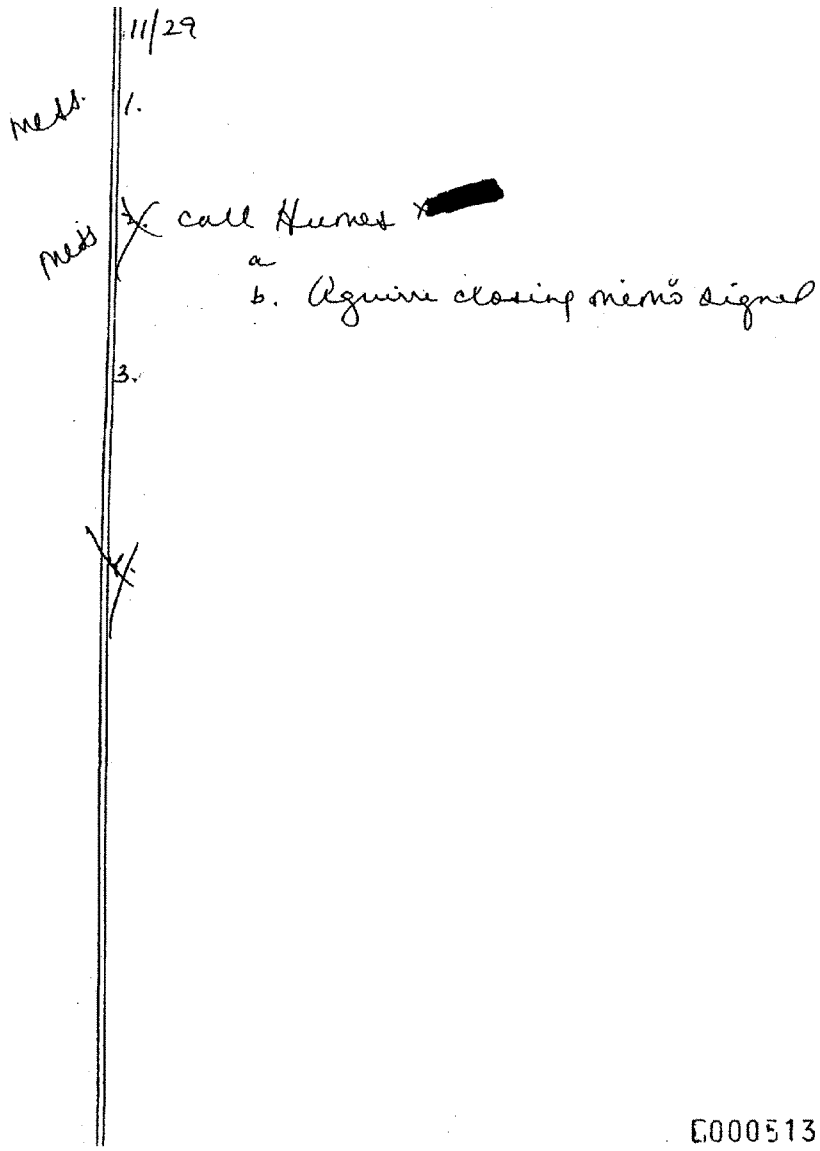
7. 1st mtgs (Aguirre w/ Hanson & Kretman — when? documented?

8. evaluations undated & written by immed supr & Asst Dir.

call Susan Markel? re: eval. / comp comm.

9. Enf. didn't keep copy of EPF given to Aguirre, only noted what it contained

E000512


11/29
Mets.
1.
Mets
2. call Hurnes [redacted]
a
b. Aguirre closing mems signed
3.

Draft—June 30, 2005

PRIVILEGED & CONFIDENTIAL

ATTORNEY WORK PRODUCT

Morgan Stanley Board Meeting – June 30, 2005

REDACTED

The SEC, through Linda Thomsen, the Chief of Enforcement,

has told me that it is too early for them to conclude whether Mr. Mack had any involvement in any allegedly unlawful insider trading by Pequot.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

III. SEC Conversations

A. You will recall that last Friday, after Morgan Stanley had been subpoenaed for Mr. Mack's e-mails with Samberg, Eric Dinallo spoke to Paul Berger, a senior supervisor in the SEC's Enforcement Division, and asked him whether the SEC had any evidence of issues for Mr. Mack in their insider trading

REDACTED

investigation of Pequot. The response was that the SEC was looking at Mr. Mack, among others, as part of their investigation, primarily based on what they had seen in e-mail traffic, but implied that they did not presently have evidence of any wrongdoing by Mr. Mack.

B. I also spoke with Linda Thomsen on Monday and Tuesday of this week. On Monday, we sent to her about 25 of the emails responsive to the SEC subpoena and on which we interviewed Mr. Mack on Sunday -- that were culled from the Morgan Stanley emails as possible emails of interest, and asked her to review those and tell us, if she could, whether they changed the SEC's assessment of the situation and whether they could give us any further comfort on Mr. Mack's status.

C. Thomsen called me late on Tuesday ~~after she and her staff had~~ reviewed those emails and confirmed that the emails did not change their view of Mr. Mack, it was still "too early" in the investigation to tell whether Mr. Mack had any issues. She added that there is "smoke there" – but that there was "surely not fire." She said they are weeks away from knowing more and could give us no more comfort. She commented that the "Board will have to trust him ~~or not~~."

REDACTED

REDACTED

It does seem clear that the SEC ~~will continue to pursue~~ the Pequot investigation aggressively, including making sure that there ~~is no~~ misconduct by Mr. Mack. One has to assume that the existence of the investigation, and that Mr. Mack's e-mails have been subpoenaed could become public. It also seems likely that Mr. Mack ~~could~~ be asked to testify in the SEC's investigation at some point.

U.S. SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

- - - - - - - - - - - - - - - - - - x
:
In the Matter of: :
:
TRADING IN CERTAIN SECURITIES, :
No. HO-9818, and the SEC's :
TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
- - - - - - - - - - - - - - - - - - x

Friday,
September 15, 2006

The interview of HILTON FOSTER, Esquire, retired Securities and Exchange Commission was convened pursuant to notice, at 1:02 p.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance

HAROLD H. KIM, Esq.
Chief Civil Counsel
U.S. Senate Committee on the Judiciary

HANNIBAL G. WILLIAMS II KEMERER, Esq.
Counsel
U.S. Senate Committee on the Judiciary

STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

P R O C E E D I N G S

MR. J. FOSTER: My name is Jason Foster. I'm an investigative counsel for the Senate Finance Committee. If we could just go around the room and have everyone introduce themselves for the record.

MR. PODSIADLY: Nick Podsiadly, with Senator Grassley's Finance Committee staff.

MR. KEMERER: Hannibal Kemerer, with Senator Specter's Judiciary Committee staff.

MS. MIDDLETON: Stephanie Middleton, Senator Specter's Judiciary Committee staff.

MR. H. FOSTER: Hilton Foster, F-O-S-T-E-R, retired former SEC attorney.

MR. J. FOSTER: Okay. We are making a record of the interview today. We are doing that so that the staff can focus on questioning rather than note-taking, given some of the complexity of the issues, and to ensure that we all agree about what is said.

The witness will have an opportunity to review the transcript. It is not a deposition. It is a voluntary informal interview. The witness will not be sworn. However, it is part of a joint inquiry by the Finance and Judiciary Committees into the firing of SEC attorney Gary Aguirre, and several related issues, therefore, everyone has an obligation to be truthful under 18 U.S.C. 1001.

Thank you, Mr. Foster, for coming down today. If you want to take a break at any point, just let us know and we'll be happy to do that. I will start with the questioning, but it's informal, so people will just jump in whenever there's anything relevant.

Can you give us a little bit of a thumbnail sketch of your history of employment with the SEC, to start out?

MR. H. FOSTER: Right. I was born in 1945. I graduated from law school, Howard University, in 1973, the first professional -- and I'm a member of the DC Bar. The first professional job I had was with the Securities and Exchange Commission, Washington, DC, Division of Enforcement. I worked there until I retired in July of 2005.

While at the SEC, I spent five years in the Commission's Washington Regional Office in Arlington, Virginia. In, I guess, the mid- or early-'80s, then I returned back to Enforcement at the Headquarters office, primarily as a staff investigative attorney.

I was a Branch Chief at one point, I believe. When I retired, I was a GS-15, specializing in insider trading investigations and training others on how to conduct insider trading investigations.

MR. J. FOSTER: And when did you first have any

involvement in matters related to Pequot Capital Management or Arthur Samberg?

MR. H. FOSTER: I had involvement with Pequot and Arthur Samberg in the mid- or early-'90s when we did an insider trading investigation. I don't remember the name of the issue. But to make a long story short, I took his testimony and the end result of the investigation was, no charges were brought, no charges were filed, and we closed the investigation without enforcement action.

In 2004 -- in about the fall of 2004, Gary Aguirre was referred to me because he was working on a hedge fund matter that had to do with possible insider trading, and I have a reputation for knowing a little bit about insider trading, so he came by to see me.

And I learned at that time that the investigation that he was conducting involved Pequot, and that my interest -- because I had some knowledge of Pequot and Mr. Samberg, so I spent probably half an hour talking to him in general terms at that time about insider trading investigations and the difficulties of investigating possible insider trading by a hedge fund.

Subsequently, I sort of nosed my way into his investigation because I was interested in it, and I spent a lot of time, from the fall up through July 2005 -- the

beginning of July of 2005, assisting Gary and making recommendations as to the conduct of the investigation.

I was not in the same reporting chain that he was in. I'm sort of a lone maverick. Technically, I guess I reported to an Assistant Director and a Branch Chief. I had 30 years' experience, and people generally let me do my own thing and run my own investigations, as long as I kept them informed.

And Gary, as I said, was in a different unit of the Division of Enforcement and I did not technically report to his supervisors, but I gave Gary input into the conduct of the investigation. And during that time frame I might have attended one or two meetings with his supervisors, during which time they discussed various aspects of the investigation.

My primary contact and involvement in this matter was directly with Gary and directly with reviewing the evidence that he had obtained. I think I sat in on some of the testimonial sessions as well. At some point, I believe my name was added to the formal order directing the investigation.

MR. KEMERER: I was just going to say, who was the Assistant Director that you reported to?

MR. H. FOSTER: You're going to kill me. I don't remember. I left the Commission and I can't

remember my relatives' names, so -- [Laughter]. But give me a minute and I'll think of it. I should have brought it.

MR. KEMERER: No. Take your time. If it comes to you later --

MR. H. FOSTER: Yes. It'll come to me. Well, at one point it was Jerry Eisenberg, but I think he might have been gone at that point. And I'm trying to think of who it would have been. But --

MR. KEMERER: Was there a Branch Chief under the Assistant Director?

MR. H. FOSTER: Yeah. But --

MR. KEMERER: Okay.

You had a certain degree of autonomy, I take it.

MR. H. FOSTER: I worked hard to get it. And, yes, I used to be.

MR. J. FOSTER: Do you recall ever telling Gary Aguirre that you believed that Pequot and/or Arthur Samberg were "serial" insider traders, or something to that effect?

MR. H. FOSTER: I probably said something like that. I'm sure I did. Not in the sense that we had proven that they were serial insider traders, but in the sense that when he came to me, he was investigating what

is known as a referral from one of the SROs, self-regulatory agencies--I think it was the New York Stock Exchange--on maybe one or two stocks. And one of the first things I did, I said, Gary, you've got to understand something.

Hedge funds -- the danger of hedge funds is that they can be involved in serial insider trading, and when they get to be as large as Pequot, it is a very difficult thing for investigators to ferret out. If we're going to do this investigation right, we've got to go to the SROs and figure out how many referrals they've made involving Pequot over the last five years. So at my instigation, we went -- I went up to New York.

I met with representatives of the New York Stock Exchange, and probably a couple of the other exchanges, and asked them to pull all of their referrals of possible insider trading which involved Pequot. The bottom line was, we ended up with over a dozen such referrals.

As you probably know, those referrals are not proof, they're just the result of a regulatory agency looking at trading prior to a significant announcement which involved a significant price move, and identifying the funds and individuals who purchased during the relevant period.

And the SROs will do their own preliminary investigation and, when they deem it appropriate, they will refer their findings to the SEC. We get them and decide whether or not to follow up with our investigation. But the point being, if a hedge fund is engaged in insider trading as to Stock A, if you're a good investigator, you recognize the fact that there is serious potential for serial insider trading, meaning that there is more than one instance of insider trading.

Because of the nature of the business, hedge funds are going to have their fingers -- they're going to know people in the business. They're going to know the investment banks, they're going to know the law firms, et cetera, et cetera. It's almost an incestuous relationship. And they will have contacts which will put them, in theory, in position to be regularly receiving so-called material, non-public insider information about mergers and acquisitions.

So my concern with the investigation was, potentially, you are dealing with serial insider trading. And "serial" in the sense that we already -- I knew that there were over a dozen instances in which Pequot's name had come to the attention of SROs in the context of possible insider trading.

MS. MIDDLETON: Can I ask you a little bit

about that, the "serial"? You're not talking about, like, trading in a particular stock on a number of days, but rather --

MR. H. FOSTER: No, no. I'm talking about specific -- a number of different instances, a number of different deals --

MS. MIDDLETON: Right.

MR. H. FOSTER: -- in which that particular hedge fund's name had come up.

MS. MIDDLETON: All right. Thanks.

MR. J. FOSTER: And so the referrals, as they come in to the SEC in the normal course from the SROs, are those not organized or categorized so that you could easily tell that Pequot was --

MR. H. FOSTER: Well, yeah. But --

MR. J. FOSTER: -- involved in many of them?

MR. H. FOSTER: they are and they are not. They are -- we have a -- an Office of Market Surveillance and they keep -- that's within the Division of Enforcement. They keep all of these SROs, these referrals that come in, and if memory serves me correct, they are categorized and filed not according to the name of the potential insider trader or fund, but under the name of the issuer involved.

So if it's possible insider trading in IBM, you

could find it that way. But to go -- and I did this. I went to our people. I forget who provided it. But I said, I want to see all the stuff that we have involving Pequot. And then I got on the phone, and like I said, I went up to New York and I talked to the people up there and said, look, I want to know all the instances where Pequot's name came up.

But in answer to your question, I did not have the capability, and I didn't think anyone in the Division had the capability, of going to a computer, pushing a button, and saying, here are the 10 referrals that involved this particular entity.

MR. J. FOSTER: And that would include folks in the Market Surveillance Division? They also don't have that capability?

MR. H. FOSTER: I was not aware that they had that capability, no. They had the capability of pulling up by issuer. They also had -- they had a file, they had a name. What was the name?

MR. J. FOSTER: By "issuer", you mean, so my Heller --

MR. H. FOSTER: IBM or Heller, or whatever.

MR. J. FOSTER: Okay.

MR. H. FOSTER: That type of thing.

MR. J. FOSTER: The stock being traded.

MR. H. FOSTER: Right.

MR. J. FOSTER: Right.

MR. H. FOSTER: Now, there was a list, UAF, Unusual Activity File, that was computer generated. And if memory serves me correct, that may have kicked out not only the issuer, but the trading investigation or hedge fund as well. But to the extent we had a UAF, Unusual Activity File, we reviewed that and, you know, we found whatever that showed.

But my point is, as an investigator, you go back to the people who are doing this thing because you don't want to have a situation where something fell through the cracks.

MR. J. FOSTER: And whose decision is it to provide the referrals to the SEC in this format?

MR. H. FOSTER: Well, the self-regulatory organizations--by that I mean the exchanges, the New York Stock Exchange, the American Stock Exchange, NASDAQ, what have you--they all Market Surveillance units whose job it is to monitor the market, and when they see a significant price move, they'll go back and see who was trading before that significant price move, they'll figure out what the news event was that gave rise to that price move, and then they'll do whatever they need to do to determine whether it is something they want to follow up

on or whether it's something they want to refer to the SEC.

If they refer it to the SEC, it goes directly to the Division of Enforcement Market Surveillance Unit. At that point, a supervisor or someone would look at it and either farm it out to an investigative branch or not, depending upon, you know, whatever.

MR. J. FOSTER: So with Pequot, was this the first time that you had attempted to do this, to get the information in a format that would gather together all the referrals on a particular trader rather than on the stock issuer?

MR. H. FOSTER: Was it the first time I had done that as to Pequot or as to anyone?

MR. J. FOSTER: As to anyone.

MR. H. FOSTER: Probably not, because by the end of my career I'd had a lot of cases that involved what I'll call serial insider trading, where you get some guy that's got a pipeline to a law firm or an investment bank, or what have you. So I had done that before, but I don't think I had gone up to New York and specifically met with and talked to people.

I mean, the difference here was, in most insider trading cases you're not dealing with hedge funds. If you're going to do an insider trading

investigation and you're dealing with hedge funds, there are a number of issues that make that investigation extremely difficult.

MR. J. FOSTER: Such as?

MS. MIDDLETON: Can you tell us?

MR. H. FOSTER: Yeah. A hedge fund is an entity that has a whole bunch of other people's money and invests in all kinds of different securities. So if you go in and say, I think, Hedge Fund A, you engaged in insider trading in IBM, they will open their files and say, we make two million trades a year, and so what if we got lucky on IBM? It's very difficult to prove a case where they've got that kind of trading history all over the board.

So what you do, from an investigative standpoint, is you see whether there's a pattern there. It's easier to prove something if you have a patten than if you have an isolated incident among 200,000 shares, 200 million trades, or whatever.

So hedge funds are different than the ordinary investigation. If I think you engaged in insider trading I'll get your monthly account statements from Schwab, or whatever, and you've got five trades in five years, and that one big one sticks out like a sore thumb.

A hedge fund, if you're looking at one trade,

that doesn't stick out like a sore thumb. But what you want to be able to do, is see whether there is a pattern there that will stick out like a sore thumb.

So that's why you have to go back and say, if we're going to do this investigation we can't just be looking at Heller, because no matter what we find there will be an explanation.

But if you've got Heller and 12 others that you can link up to the same individual or firm that was involved in all 12 deals, then you've got something you can work with, if that makes sense.

MR. J. FOSTER: I think I understand.

So had you been involved in any other kind of systematic effort to look at a hedge fund like this before?

MR. H. FOSTER: A hedge fund? No. I had, myself, been the principal investigator in a possible insider trading situation that did involve Pequot, but that was 10 or 15 years earlier when I didn't know as much as I knew later.

MR. J. FOSTER: And so that was a more discrete investigation in regard to one --

MR. H. FOSTER: That was more discrete. I had not gone through this review.

MR. J. FOSTER: Right. Okay.

MS. MIDDLETON: But what happened? You just couldn't find evidence of a tamper?

MR. H. FOSTER: Well, I was trying to remember. I remember specifically I had -- to make a long story short, I had figured out where they probably got the information. By that, I meant they had come up with a diagram that could show this guy had the information, and through a series of phone calls, was in communication with Pequot. Okay.

But that was very circumstantial and it wasn't that strong a case. But I remembered -- I mean, it's six degrees of separation. You can connect people up if you spend enough time.

MS. MIDDLETON: Uh-huh. Uh-huh.

MR. H. FOSTER: But the answer is, I had been involved in that investigation 15 years ago. We did make a connection, but it wasn't strong enough to make a recommendation to the Commission for any enforcement action, so it was closed without action.

MR. J. FOSTER: Are you aware of any other sort of systematic efforts of the kind that Gary Aguirre began in the fall of '04 to look at a particular --

MR. H. FOSTER: Hedge fund, or any --

MR. J. FOSTER: Well, either hedge fund or any particular institutional entity from a systematic point

of view, where you go and you pull all the referrals related to that large entity.

MR. H. FOSTER: Not so much from an entity standpoint, but from an individual or specific account, yes. I had conducted a lot of investigations in which, at the end of the day, we sued people who had been involved in insider trading in 20 different deals, or what have you. But those were individuals. They were not hedge funds. Okay.

So the difference here was, an attempt was being made through this investigation to see how bad the hedge fund industry, or this particular fund, was if, in fact, it was dirty.

MR. J. FOSTER: So is there any mechanism for systematically -- for the SEC to systematically monitor the number of referrals related to a particular trader like a hedge fund?

MR. H. FOSTER: Yes. That is through the computer run known as the Unusual Activity File.

MR. J. FOSTER: Uh-huh.

MR. H. FOSTER: And what happens is --

MR. J. FOSTER: And that's controlled by the Enforcement Division or by the SROs?

MR. H. FOSTER: Well, I know we have it. We have a copy of it. Whether we generate it or not, I

don't know; that's something that someone in Market Surveillance could tell you.

But the point is, there is such a list and investigators have access to it. But not all the investigators realized that the list existed. But the people in Market Surveillance who had that primary responsibility, they had it.

MR. J. FOSTER: Okay.

So the UAF is the place that someone like you or Gary would go when you're looking at a big institutions.

MR. H. FOSTER: That's one of the places we would go, yes.

MR. J. FOSTER: Okay.

So why was it that you had to go up to New York then and go to the New York Stock Exchange and --

MR. H. FOSTER: Because you always have to talk to people. You always have to talk to people because you want to get a sense as to whether they think this is something that needs investigating, or whether there's something they didn't put in the papers.

MR. J. FOSTER: Uh-huh.

MR. H. FOSTER: Because you ask -- you ask them to go back and -- that's what a good investigator does.

MR. J. FOSTER: Okay.

But you had the raw data in the UAF file already. You didn't have to go up there to get it from them. Is that accurate?

MR. H. FOSTER: Well, we had some raw data. We needed -- I felt we needed to go up to New York to make sure that it was complete.

MR. J. FOSTER: Okay.

MR. H. FOSTER: I mean, it's just, if you're going to do it, you check.

MR. J. FOSTER: Sure. Uh-huh.

MR. H. FOSTER: I mean --

MS. MIDDLETON: When you met with them, did they seem to think that there was something unusual going on?

MR. H. FOSTER: Well, investigators, in general, are skeptical. And the people I met with, I'd known for quite a while. They were -- you know, let's put it this way. There's a lot of money to be made if you can -- if you know the deals are coming.

The nature of the business is that there's a lot of money floating around, there's a lot of opportunity, and so if you don't think it's going on, you've got your head in the sand. Proving it is another matter.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: But you don't deserve to be an investigator if you don't start with the assumption that this is worth looking at. I mean, it's --

MS. MIDDLETON: But when you met with them specifically about --

MR. H. FOSTER: No one ever said to me, you're all wet, there's no way in the world this firm could be involved in insider trading. To the contrary, the general thing was, good luck. We all know it's there, but you know how hard these cases are. That's the general lay of the land.

MS. MIDDLETON: Uh-huh. Uh-huh.

MR. KEMERER: Can we go off the record for a second?

[Pause]

MR. PODSIADLY: Mr. Foster, I had one quick follow-up point. You had mentioned that, in this matter, it would be important to review all of the different referrals to sort of get a grasp on if you were going to proceed against Pequot.

In your view then, would it have been a poor choice, or a choice that, if you were in the position, you wouldn't have made to dial back how many of those referrals you were going to follow up on if you were a Branch Chief?

MR. H. FOSTER: When you say "dial back", you mean --

MR. PODSIADLY: To say, we're not going to look at all 12, we're only going to look at two of them.

MR. H. FOSTER: There are limitations in terms of staff time and resources. But you want to know what the potential is and then you do a triage and you say, okay, the one that was 40 years ago maybe I'm not interested in. But you want to know what, potentially, is worth looking at.

Obviously you can't look at everything 100 percent at the same time, so you do a triage and you try to decide which ones you're going to focus on. As I recall in this case, we had a list and, you know, we'd review it and say, well, what do you think, what do you think, what do you think? And at some point, the 18, or whatever it is we began to focus on -- I don't remember which ones we focused on.

But my point was, if there are 18, you want to be aware that there are 18, and if you cut it to 6 and you do a little bit of investigation and you find out whatever you find out, then you go back and you look again at the 18 to see whether anything that you came up with there changes your view as to whether you ought to be looking at the other 12, whatever it is.

MR. J. FOSTER: Okay.

What do you know about the decision to limit the number in this case? To limit the number of referrals?

MR. H. FOSTER: I know absolutely nothing, other than, to the extent I would have been involved from a practical side -- I mean, we sit and we say, okay, this week let's look at this, this and this. You focus on what seems to make the most sense.

I mean, my recollection isn't terribly clear, but obviously one of the things that you're doing, is you're making a list of all of the law firms and investment banks that are involved in each of the deals. You're looking at that thing and saying, well, is there one firm that pops up in all 18? Is there one firm that pops up in 12? Are there two firms? That's the type of analysis you do on an ongoing basis.

MR. J. FOSTER: And that was done in this case?

MR. H. FOSTER: Oh, yes. Yes. Because one of the -- you try to figure out, who are the common players? Because if someone is spilling the beans, then he's spilling -- you want to find the commonality. So if you have five deals that have the same investment bank, from an investigative point of view, that's a very significant or diagnostic effect. Okay.

If you have a couple of deals sitting out here that have no connection, you put them aside for a while. Then you go on an investigation and you might find out, well, at one point the guy who worked at this firm was working over there that you thought didn't have anything. But that's the type of analysis that you're going through.

MR. J. FOSTER: Was it your understanding that the narrowing in this case was based on that sort of analysis or was it based on more of just, we don't have enough resources, cut it to some arbitrary number?

MR. H. FOSTER: I don't -- as I sit here, I don't know. But I can tell you that my recommendation would have been, if we were focusing on a firm or a couple of individuals, that would have been a reason to keep something in if you're going to do the investigation.

MS. MIDDLETON: Do you remember why or how Gary did end up sort of focusing on the GE-Heller deal?

MR. H. FOSTER: I remember that it was more promising, and I'm trying to remember why. I can just speculate now. But I do know that Gary got a gazillion e-mails and other bits of information, telephone records and what have you, and Heller was -- you know, Heller was the throbbing light that we were focusing on. Yeah.

That might have been the actual investigation. When he first started, he might have been looking at it. You see what I'm saying? Someone says, go investigate Heller.

MR. J. FOSTER: Uh-huh.

MR. H. FOSTER: He comes and talks to me. How do you do this investigation? I say, look at everything, so it grows bigger. So that might have been the starting point. I'm not -- you know, I'm not --

MR. KEMERER: Do you recall him also investigating Microsoft trading that might have seemed suspicious?

MR. H. FOSTER: I don't recall that.

MR. KEMERER: Okay.

MR. H. FOSTER: I don't recall that.

MR. J. FOSTER: What was your impression of Gary Aguirre?

MR. H. FOSTER: Gary Aguirre -- I've been at the Commission for 30 some-odd years. I've never seen anyone who was any better at pursuing that type of case. He

was --

MR. J. FOSTER: Meaning a big, broad case?

MR. H. FOSTER: -- A number 1. A number 1. He was on top of his documents. He knew what he had. He was enthusiastic. He didn't jump to conclusions. A-

number 1.

The knock that I had on Gary--and I suspect other people had it too--was when you're that good, it's difficult when your supervisors don't necessarily agree with you.

He wouldn't do something -- my opinion was, he wouldn't do something that his supervisor -- if his supervisor said don't do X, he wouldn't do it, but he wouldn't be a happy camper.

He wouldn't say, oh, you're so smart for telling me not to do X. I think the impression the supervisor would be left with is, this guy thinks I'm an idiot for not letting him do what he wants to do.

But my impression of him? A number 1. Should he have been fired? I don't know why he was fired. Okay. But could he do the work? Yes. Was he doing the work? Yes. Was he doing a bang-up job? Yes. And I say that based on 30-something years' of experience.

MS. MIDDLETON: Did you find him difficult to work with?

MR. H. FOSTER: Difficult to work with? He was -- he was different in the sense that he was not someone who would be joking around and kidding around all the time, that type. He was business. Okay. And his mind-set was, let's advance the ball here. I mean, he was a

man on a mission. Okay. And that made him a lot more tense than most people. Okay.

His style was completely different from mine. I remember, we'd have meetings with the opposing counsel and I'd come out of the room and I'm all tensed up because of all the tension that's in the room. And I'd look at the opposing counsel and say, my God, this was a tense meeting. Okay.

Whereas, if I'm running the meeting -- and I made a point. I'd say, Gary, this is your case, you know, but I'm here to help. If I'm running the meeting, you'll come out and everybody will be all smiles. I said, well, he's outrageous, but he's a nice guy.

With Gary, it's -- you know, the request for documents is outrageous and he's not a nice guy, if you see what I'm saying. But in terms of his quality as a lawyer, not interpersonal skills but in terms of dealing with the evidence, knowing what to get, knowing how to get it: unmatched.

MS. MIDDLETON: Do you recall ever making a comment to Linda Thomsen?

MR. H. FOSTER: Yes. During the investigation it became clear to me that the investigation was very significant and I said, I want to make sure the front office knows about this, or how I feel about it. You

assume that they do, but you don't know.

So I had told Gary that I'm going to go see Linda and tell her. And, of course, I hadn't had an opportunity to go see Linda, and then I had my going-away party. And Linda came to my going-away part.

MR. J. FOSTER: When was that, by the way?

MR. H. FOSTER: The first week of July, ball park, of '05. And I pulled Linda aside. I pulled Gary over. I said, "Linda, this is Gary. I don't know if you know him or not, but he's working on what I consider to be one of the most significant cases I've seen at the Commission, and he's doing a hell of a job." So that's the comment.

MS. MIDDLETON: Did you ever tell her that you found Gary difficult to work with?

MR. H. FOSTER: I don't think I would have told her that, no. I think that might have come up in the context -- I was thinking about that today. I had a brief conversation with Jim Clarkson.

Jim Clarkson was one of my first supervisors. He's older than I am, older than dirt. [Laughter]. But a really great manager type. You know, he didn't do a lot of cases, but he's like the guy who you send to deal with the Chairman, he's the guy you send to deal with the regional offices. He's the guy, from a management

standpoint, that you want on your team. And I had mentioned, or he might have even heard me say that to Linda.

And if memory serves me correct, he might have said something to the effect that Gary can be difficult. And I remember at some point -- I don't know if I made the comment to Jim or to someone, but I said, you know, Gary doesn't play well in the sandbox. And I told Gary that.

But in thinking back on it, I would imagine that Jim might have been involved. You know, Gary had filed an EEO complaint, and I don't know if Jim was involved in that or not. But I guess what I'm saying is, Jim knew more about Gary than I did in terms of whatever history there was.

MR. J. FOSTER: In terms of his litigation, or complaints that --

MR. H. FOSTER: Yeah. Gary had told me that he had filed what I understood to be an age and race--Hispanic, or something--discrimination because he wasn't initially hired.

And my understanding was, he had taken a course and had done very well in the course at G.W. or something, that was actually taught by Mark Krietman, and had won second place on his paper, or something. But

he's obviously a very sharp guy. But for whatever reason, he didn't get the job initially. He filed a suit and then he got hired, and whatever. So I knew that there was that history, for what it's worth.

MR. J. FOSTER: Did other people at the SEC bring that up to you --

MR. H. FOSTER: No.

MR. J. FOSTER: -- as a reason not to listen to his advice or not to take his --

MR. H. FOSTER: Nobody ever told me who to listen to. [Laughter].

MR. J. FOSTER: As a criticism of Gary, though? As a criticism of his work?

MR. H. FOSTER: Oh, no, no, no. It's just observation. You meet people. Some people come in and put you at ease. Some people might tend to tense up a meeting. He would tend to tense up a meeting more than put it at ease. But in terms of his ability to do the work, he would be one of the first guys I'd call.

MR. J. FOSTER: Okay.

But you don't recall telling Linda Thomsen at your going-away party that he was difficult to work with?

MR. H. FOSTER: I know that I could have said something like that, because that would have been consistent with not playing in the sandbox. If Linda

said I said it, I have no doubt about it that I said it. If she said it, I wouldn't dispute on that, but I don't recall saying that.

MR. KEMERER: Just to clarify.

MR. H. FOSTER: I think I might have said it to Jim Clarkson. But now, whether she was there or not at the time, I don't know. But --

MS. MIDDLETON: Do you think that happened at your retirement party with Clarkson, that comment?

MR. H. FOSTER: With Clarkson, yes. I think that's the only time I ever talked to Jim about Gary, if I'm not mistaken. But this over a year and a half ago, so --

MS. MIDDLETON: Yes.

MR. KEMERER: Just to describe what you might think was the chronology, at your retirement party you bring over Gary to Linda, or Linda to Gary, and you introduce him to her.

MR. H. FOSTER: Yeah.

MR. KEMERER: And you say something very good about his work and the importance of the case.

MR. H. FOSTER: Right.

MR. KEMERER: Clarkson may have overhead you say that. Is that what you're saying?

MR. H. FOSTER: He may have. He may have.

MR. KEMERER: And then after Mr. Aguirre walks away, he might have said something like, you know, that guy's -- I hear he's hard to work with. And you might have said in response, he doesn't play well in the sandbox.

MR. H. FOSTER: Exactly. Exactly.

MR. KEMERER: Okay.

So this is all pretty much contemporaneous.

MR. H. FOSTER: Exactly. That's my recollection.

MR. KEMERER: Okay.

MR. H. FOSTER: Yeah. That's my best take of it. Yeah.

MR. KEMERER: Okay.

MS. MIDDLETON: Did Gary come to you for advice on insider trading? You said you nosed your way in. But who came to who?

MR. H. FOSTER: Yeah. Yeah. Gary -- I didn't know Gary from Adam. He showed up in my office one day and said, I hear you're the guru on insider trading. I've got this case. I just want to touch base with you. I said, well, what are you looking at? He said, a hedge fund. My eyes poked right up.

And when he said "Pequot", I almost grabbed the referral out of his hands because I was -- I wanted to --

as I said, you've got the big one if you're working on that one, because that's a tremendous hedge fund. If there's going to be a problem with hedge funds, I'd seen that name too many times, and whatever. Not to cast aspersions on them, because nobody's proven anything, but from an investigator's point of view --

MR. J. FOSTER: You mean, you had seen their name coming up in other investigations or in other referrals?

MR. H. FOSTER: I had done an investigation of them.

MR. J. FOSTER: Right.

MR. H. FOSTER: And in the course of doing other insider trading investigations, as a matter of course, I would go and look at the Unusual Activity File with respect to whatever I'm looking at at that time. At that point, I probably had seen Pequot's name on a bunch of them. You know, I'd go, oh, my God, they're all over the place.

But in fairness to Pequot, there are other firms whose names, you know, would pop up, too. But the point being, Pequot was probably one of the top 10 hedge funds in terms of size before it split up a few years ago, but it was very active in the M&A market, as we say.

MS. MIDDLETON: So he came to you for some

advice.

MR. H. FOSTER: Uh-huh.

MS. MIDDLETON: And you said, yeah, yeah, this is it. Did he -- and then you kind of nosed in. I mean, did he follow advice that you gave him and seem to appreciate it?

MR. H. FOSTER: Oh, yeah. I mean, there was never -- there was never a time when I told him something that he would say, this is crazy, or anything like that. But you've got to remember, I knew what I was talking about.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: This was his first. He was a very smart guy, but he hadn't done insider trading before.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: So he enjoyed, I think, my enthusiasm and he saw that I wasn't trying to take the case away from him.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: I was just trying to add value to the investigation. So did I find him difficult to work with? No. I found him easy to work with. But at times he had a way of tensing up. Not with me, but if you have a meeting with counsel or whatnot, he's more of

a "bang the table" kind of guy than I am.

MR. J. FOSTER: But not with other folks at the SEC, with his colleagues?

MR. H. FOSTER: I didn't see him interacting with his colleagues. I don't -- you know.

MS. MIDDLETON: Was your "sandbox" --

MR. H. FOSTER: And I told him that, you know. I said, that's not -- you know, I don't have a problem telling you that, because I told him that.

MS. MIDDLETON: Was that addressed -- who's in the sandbox with him, his colleagues, or opposing counsel, or his supervisors?

MR. H. FOSTER: At that point I wasn't thinking about who was in the sandbox. I was thinking in terms of just an expression which would come close to saying, here's a guy that doesn't put everybody at ease.

MS. MIDDLETON: Okay. Okay.

But you've described, I guess, opposing counsel. But are you also saying that maybe his colleagues --

MR. H. FOSTER: Well, I don't -- I hadn't seen that --

MS. MIDDLETON: Okay.

MR. H. FOSTER: -- with his colleagues. Certainly, I was his colleague and I didn't have a

problem with him. He and I never came in yelling about this, that, and the other. I don't recall us having a strategic disagreement about how to conduct the investigation.

MS. MIDDLETON: Okay.

MR. H. FOSTER: Because one thing I admired about him was, he's obviously a very smart guy, but he's willing to listen, and he would listen to what I said. That, to me, was -- made me feel good.

MS. MIDDLETON: Uh-huh.

MR. KEMERER: Speaking of strategic decisions, I mean, that's one of the big points in our investigation. I mean, did there come a time while you were at the SEC still before you retired in July that Mr. Aguirre expressed a desire to interview John Mack or take his testimony?

MR. H. FOSTER: Before I left, I think it's fair to say that Mack was a person of significant interest in the investigation, and it was clear to me that at some point Mack's testimony needed to be taken.

And I understand that the issue was, well, when do you take it, and this, that, and the other thing. As the SEC expert on insider trading, if people had asked me, when do you take his testimony, I would have said, take it yesterday. Okay.

In terms of the strategy of the investigation --

--

MR. J. FOSTER: Did anybody ask you?

MR. H. FOSTER: No.

MS. MIDDLETON: Did Gary ask you?

MR. H. FOSTER: I don't recall him asking me.

MS. MIDDLETON: Did he discuss with you --

MR. H. FOSTER: I -- I don't know. I was out of there in July. But the point I'm trying to make here is -- because obviously I know you're interested in it in terms of what was going on with Gary and the supervisors.

I recall, in the late fall of '04, early '05, Gary came to me and said, you know, in effect, those guys are crazy. They put a timeline on the investigation. I said, what are you talking about? He said, they expect me, or have directed me, to have this investigation completed by, it was either 30 days or 45 days. I specifically remember that conversation with him.

And I remember my response was, Gary, this is a big investigation. There's no way anybody can make that timeline, and don't worry about it, because I guarantee you, that timeline is going to move because this case is too important for people to be setting that kind of a timeline. So in terms of what I have to say about what I know about the interactions between Gary and his

supervisors, I remember that specifically.

I remember sitting in a meeting. I guess it was Berger and some other people, but I don't remember anything of substance about it. But people were not -- his supervisors were not coming to me saying, hey, Hilton, what do you think? They weren't coming to me. So I don't --

MR. J. FOSTER: Did you ever talk about that 30- to 45-day time limitation with anybody else --

MR. H. FOSTER: No. I thought it was so ridiculous. I knew -- I'd been there for 30 years. I knew it wasn't going to happen.

MS. MIDDLETON: Do you know why they might have done that?

MR. H. FOSTER: I have --

MS. MIDDLETON: Was there something going on with budgeting, or --

MR. H. FOSTER: I have no idea at all. I have no idea at all. It was -- it was so ridiculous that I just -- I could speculate. Maybe they were trying to motivate him, push things, and everything. But that was unrealistic.

MR. J. FOSTER: Did you have any idea who it came from? Did Gary tell you who it came from?

MR. H. FOSTER: Well, I mean, if it was a

deadline it wouldn't have been coming from someone below him, it would have come from someone above him, so I would assume one of his supervisors.

MR. J. FOSTER: But you don't know who?

MR. H. FOSTER: Which one? I don't know.

MS. MIDDLETON: Had you seen that before where supervisors had given people really short deadlines?

MR. H. FOSTER: Managers always give deadlines. They always have wish lists and everything, you know. But this was unrealistic. And I probably said to Gary, if this becomes a problem let me know, because it's so ridiculous. If you need help on this, let me know.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: But he didn't. I think the 30 or 45 days came and went and, you know, we were still investigating it. So --

MR. J. FOSTER: Do you recall an issue about Gary Aguirre issuing some subpoenas that had to be withdrawn?

MR. H. FOSTER: I heard about that. I don't know if I heard about that contemporaneously or after I left. But my take on that is, any investigator who hasn't had a subpoena go out with the wrong or something on it and had to bring it back -- it was not unusual. It was not a big deal to me.

It was not anything I would point to as being unprofessional, or careless, or anything like that because that was -- Gary was not unprofessional. Gary was not careless.

And I think, without knowing the specifics of what was involved in terms of what the subpoena said or why it had to be withdrawn, or something like that, that's a false issue if people are pointing to that as a reason for firing him. That just doesn't cut it.

MS. MIDDLETON: One of the -- the problem with one of the subpoenas that had to be withdrawn was that it was issued to an Internet service provider.

MR. H. FOSTER: Oh, yeah.

MS. MIDDLETON: So what do you think of that? Was that a serious issue?

MR. H. FOSTER: I had a rule when I was a Branch Chief: don't ever send a subpoena to a bank without talking to me first. That's because of the Right to Financial Privacy Act.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: So I guess that Congress, in its infinite wisdom, came up with a similar act with respect to Internet providers, or something. So I would assume that that's -- I assume that there were a whole bunch of hoops people had to jump through, and he, I

guess, didn't jump through them, or whatever.

MS. MIDDLETON: But in terms of -- okay. So that happened. Big deal to --

MR. H. FOSTER: It still happens.

MS. MIDDLETON: Big deal to -- or not? How serious a problem is it? Is it something that, oh, gee --

MR. H. FOSTER: Well, it depends. It depends. I mean, if I were a supervisor and I had somebody who couldn't do the work and was habitually screwing up stuff, it would be, you know, the straw that broke the camel's back.

If, on the other hand, I had a guy who was doing a tremendous job, who'd been there for a year and this is the first time sending out an Internet subpoena or whatever it is, I might say, well, maybe I didn't train this guy right.

Instead of getting mad at him I'd say, let's go back and look and see, how did this happen, why did this happen, you know. Did he go to the training courses? Did we offer the training courses? Do we have a checklist to make sure he knew that? Because those are things that -- peculiarity. It's like the bank thing; if you don't know, then you can screw up. But it sounds to me it wasn't a situation where he was trying to hide

anything.

MS. MIDDLETON: So what happens? The ISP gets it and calls and says, hey, what are you doing, and then you withdraw. Right?

MR. H. FOSTER: Yeah.

MS. MIDDLETON: Is that -- or is it --

MR. H. FOSTER: It's --

MS. MIDDLETON: -- a bigger deal?

MR. H. FOSTER: It's "oops". You bring it back and then you do it right and send it out again.

MR. J. FOSTER: In the Financial Right to Privacy Act, there are requirements to notify the person whose records you're getting from the bank, right? Is that the issue?

MR. H. FOSTER: In most instances, yes.

MR. J. FOSTER: Right. So if you're going to get someone's bank records you have to tell the person before you're doing it that you're going to.

MR. H. FOSTER: You have to send them a letter saying -- what you do, is you send out the subpoena to the bank, and you say to the bank, get these documents but don't send them to me until I certify to you that the appropriate custom and notice has been given.

MR. J. FOSTER: Right.

MR. H. FOSTER: And so what happens is, you

send the subpoena to the bank, you send a copy of the subpoena to the customer, you send the form to the customer so that he can go into court and file something, and then after the appropriate amount of time, you call up the bank or you send the bank and say, the customer notification has been given, now send me the documents that are called for by the subpoena.

MR. J. FOSTER: Right.

MR. H. FOSTER: What happens with the Internet service provider, I don't know, because I didn't go to that course. [Laughter].

MS. MIDDLETON: But the banks would know, generally.

MR. H. FOSTER: Yeah. It's not -- yeah. No, no. Any institution -- they're going to say, you've got some new guy over there, this, that, and the other thing. But does it happen? Yes. Does it happen? Yes. Is it something you're proud of? No. Is it the end of the world? No. Can it be fixed? Yes.

MR. KEMERER: Mr. Foster, we talked a little bit about the quality of Mr. Aguirre's work. What would you have to say about his work ethic overall?

MR. H. FOSTER: He was one of the few people I knew who would be on an insider trading investigation and out-work me. He was there morning, noon, and night, and

weekends.

MS. MIDDLETON: Were there any -- well, I guess you kind of came in and out of the investigation. Is that accurate?

MR. H. FOSTER: Yeah. Yeah. Yeah.

MS. MIDDLETON: Okay.

Were there any periods of time where he sort of disappeared, that you were aware of?

MR. H. FOSTER: Not that I'm aware of, no.

MS. MIDDLETON: Okay.

MR. J. FOSTER: So he was never away for a period of two weeks where you couldn't contact him or didn't know where he was, or --

MR. H. FOSTER: I never had -- I have no recollection of trying to contact him and being unable to do it.

MS. MIDDLETON: Did he continue to -- I know at the beginning he sought your advice. But throughout did he keep coming to you and asking you --

MR. H. FOSTER: Well, we -- you know, by that point I got myself into the thick of it and I was very interested in it. And I took it upon my self to help him organize these documents that were coming in because -- I mean, we had a room full of documents and, you know, he was the primary investigator.

And I had a rule that if you subpoena something and you get it, by God, that someone ought to read it and look at it, because, you know, it's just not fair to make people go through all that production unless you really care about it and are going to read it.

So the files were -- we got a room full of files. I started making document inventories, and that kind of thing, because I wanted to make sure I sort of understood what we had and what we didn't have, because I wanted to make sure that he wasn't missing anything that I thought was significant in terms of, A) requesting it, and B) looking at it once it comes in. So did I have any trouble in terms of working with him or accessing the files? No.

MS. MIDDLETON: Yeah. I just mean -- I'm just trying to get a sense for your involvement and the relationship and whether, you know, he came to you and you gave advice to him.

MR. H. FOSTER: I was -- I was sticking my nose in because I was interested to see what we could come up with. And it was almost -- it was almost competitive in the sense that we'd get these e-mails on tape, and they'd get on the computer, you know, and I'd spend a lot of time searching for e-mails.

Then I'd find something, and then he'd say,

yeah, I saw that. Did you see this? And he'd have something I hadn't seen. I'd say, damn, how did I miss that, you know. So then you find something. You say, aha! Did you see this one? He said, no. So, you know, it's a little bit of competition there. But --

MS. MIDDLETON: Did he seek advice, or were you aware of certain disputes with opposing counsel about whether they were giving you everything, the speed with which they were doing --

MR. H. FOSTER: Oh, yeah. There was a constant fight with -- I forget the law firm. But --

MS. MIDDLETON: Fried Frank.

MR. H. FOSTER: Fried Frank. I forget the woman's name.

MS. MIDDLETON: Audrey?

MR. KEMERER: Audrey Strauss.

MR. H. FOSTER: Audrey. Audrey Strauss. Brilliant lawyer. But remember I said about tension in meetings? We'd have a meeting that would start at 4:00 and we'd be talking about the last subpoena we sent out that called for 45 million documents by yesterday, how come we haven't had them -- gotten them, and she would say, you got 2 million of them, and the other stuff, you don't know how long it takes.

And I can remember her saying it costs a lot of

money. And it's a cost of doing business. Your firm can afford it, in doing all these trades. This is what regulatory compliance is all about. You give us those damn documents. I wouldn't pound the table, but he'd be pounding the table. But, yeah. The SEC and opposing counsel always have disputes about documents and production.

MS. MIDDLETON: Was this --

MR. H. FOSTER: Is the subpoena overly broad? Are you reasonable in terms of return dates? Can we get something else for you instead of this? This shows everything you want. No, I want that. You know, it's classic, but it's tension.

MS. MIDDLETON: Was it -- yeah.

In this case, was either the breadth of the demand that the SEC was making or the response by opposing counsel different in, you know, quality from other situations or was it just typical, or --

MR. H. FOSTER: This was -- this was a major investigation. We were asking for a hell of a lot of documents. And I'm sure Pequot had to spend a lot of money producing the documents, but that's what the case required. We were not pulling punches.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: Okay. We were demanding things

that we thought were relevant and necessary. And the firm was saying, you guys have got to be nuts. But we got millions and millions of documents and they began to pay off.

MS. MIDDLETON: At any point did the documents, either from Pequot or others that you were subpoenaing in this investigation, stop coming? Were there --

MR. H. FOSTER: I don't -- I don't know. I don't have a recollection of them stop coming. Because I remember -- I remember looking, opening boxes when that stuff came in. I mean, there was -- we had enough to keep us busy. I don't -- stop coming? I don't -- I don't recall that.

MS. MIDDLETON: Was there something, like, around maybe February or so where Fried Frank was basically just either dragging their heels or refusing to turn over documents where Gary's supervisors got involved?

MR. H. FOSTER: Yeah. There was -- there was a constant fight with Audrey about document production. Now, whether they went over Gary's head and directly to his supervisors or not, I don't know. But Gary was convinced that they weren't giving us everything as soon as -- you know, on a timely basis, whatever that means.

MS. MIDDLETON: Or maybe Gary asked his

supervisors for help. I'm just --

MR. H. FOSTER: Yeah. I don't -- I -- yeah. I don't -- I don't know. I stayed away from his supervisors.

MS. MIDDLETON: Why is that?

MR. H. FOSTER: Because it wasn't my case and I would probably lose my composure if someone told me I didn't know what I was talking about in an insider trading case, and that would not be healthy for anything. So it wasn't like it was -- it was -- he had his supervisors. I was giving advice, but I was not in charge and so I did not want a confrontation with people. Conflict of orders.

MR. J. FOSTER: And you thought that if you had contact with the supervisors, that there would be conflict?

MR. H. FOSTER: If they disagreed with me there would be conflict.

MR. J. FOSTER: And you had a general idea of what their position was through talking to Gary?

MR. H. FOSTER: I had a general -- yeah. Yeah. Yeah.

MS. MIDDLETON: What was your impression of what the supervisors were doing in '05 with respect to this investigation? Now, we talked about --

MR. H. FOSTER: My impression was --

MS. MIDDLETON: -- the 30-, 45-day --

MR. H. FOSTER: My impression was, you know, they were -- they were there. They didn't talk to me about it. They knew that a lot of time, energy and effort was being spent. They probably knew that I was trying to garner as much resources as possible.

I went to our computer people and I said, look, we're going to be getting a lot of stuff and we're going to have to analyze it. We're going to have to analyze millions and millions of trades. And we had people -- we'd have meetings where there'd be eight people in the room, and half of them were computer people that I'd brought in.

And I'd say, look, we're getting blue sheet data, trade data, from 18 different stocks and there's going to be millions of trades, and we've got to -- we've got to run the trade data to find a whole bunch of stuff. And so I was not managing the case, but I was bringing in as many resources as I thought we needed with respect to the data analysis. I assumed that his supervisors were aware of it, but I didn't care because it was being done. And what --

MS. MIDDLETON: Was it your sense that they were helping or hindering, or they were just there?

MR. H. FOSTER: I thought they were - well -

MS. MIDDLETON: Go ahead.

MR. H. FOSTER: This is for the transcript. I thought they felt the investigation was proceeding on course, or something. I don't know. I mean, I don't know. I don't know. I don't kind.

MR. KIM: Can we go off the record?

(Pause)

MR. KIM: What were you going to say?

MR. H. FOSTER: In your time with the SEC, how many subpoenas have you been involved in issuing? Thousands?

MR. H. FOSTER: Hundreds. Thousands. A whole bunch.

MR. J. FOSTER: And of all those subpoenas, how frequently -- what percentage of those do you think you required that there be a memo drafted to justify -- and I'm talking about document subpoenas and subpoenas for testimony. That you required there be a memo drafted by the staff to justify the reason for issuing the subpoena that would go up the chain of command to managers at the SEC?

MR. H. FOSTER: I can't remember any.

MR. J. FOSTER: Never?

MR. H. FOSTER: That's make-work. I mean, if

you have -- if somebody wants to know why you need the subpoena, you go and you sit down and you talk to them. I need it because of this, this, and this. I mean, if you write a memo, that's -- that's my answer.

MS. MIDDLETON: In connection with Gary's interest in getting the testimony of John Mack, did he talk to you about that?

MR. H. FOSTER: I know that's a principal issue here and I'm trying to rack my brain. The best I can come up with is, it was clear to me that Mack was a person of significant interest, a person whose testimony should be taken, that should be taken sooner rather than later.

Do I recall him coming in and saying, Hilton, they won't let me take the testimony? To be honest, I can't recall that, but that might have happened. I just don't recall it. It sounds like something -- seriously, I mean -- and if he said he had that conversation with me, that would refresh my recollection, really. I mean, because I was of the view that Mack's testimony should be taken sooner rather than later, and that was my opinion.

MS. MIDDLETON: Do you recall any discussion -- I mean, you've obviously read a little bit about this situation.

MR. H. FOSTER: Yeah.

MS. MIDDLETON: But do you recall any discussion at the time in '05 of why it was that Gary's supervisors weren't agreeing with him on the timing or the taking of Mack's testimony?

MR. H. FOSTER: As I sit here, I can't say for certain when this thought came into my mind, or how it came into my mind. It might be, you know, a bad dream or something. I don't know. But at one point, I had the issue in my mind that somebody was going to be leaving the Commission and going to work for somebody, and the question was, did that have anything to do with the course of the investigation?

MS. MIDDLETON: But you don't remember when you had that thought.

MR. H. FOSTER: I don't. I don't. But I think that would be something that would be very easy to check, who left, where did they go?

MR. J. FOSTER: You don't remember who it was that was leaving, or --

MR. H. FOSTER: It's hard to believe. I worked at the Commission for 30 years and I'd see people on a daily basis, and I wouldn't know their names. I mean, I -- you know, I mean, I just don't go there. But I remember having that thought.

MS. MIDDLETON: So you -- when you retired, you

said it was July --

MR. H. FOSTER: '05.

MS. MIDDLETON: End of July? Do you recall?

MR. H. FOSTER: I'm trying to think. I went on Commission business to China. I came back. It was around the 4th of July. I put my papers in and I was gone.

MS. MIDDLETON: Two-week notice, or --

MR. H. FOSTER: Well, you know, one-week notice, whatever it was. Yeah.

MS. MIDDLETON: So maybe mid-July. Is that --

MR. H. FOSTER: I think mid-July might be what the papers say, but I was out of there before the middle of July.

MS. MIDDLETON: Okay.

And was the issue about the taking of John Mack's testimony and Gary's, I'll say, frustration, was that hot right then when you were leaving or is that something that happened after you left?

MR. H. FOSTER: Well, I was, for all intents and purposes, out of there. If it were hot, I don't recall it being hot. But it might have been hot. I don't know. I don't know.

MS. MIDDLETON: Okay.

So when you left, the investigation was just

kind of going along and Gary --

MR. H. FOSTER: When I left, I remember that we had uncovered what I, as an investigator, felt to be some very interesting evidence in the e-mails. Very interesting. Not stuff that would necessarily prove the case, but something that would just light up an investigator's heart.

I remember one that Gary had found where there was an e-mail from one of the people at Pequot to another person at Pequot saying, basically, "nice trade", or something, and then exclamation mark, or something, and we could tie it to something else. It just -- it just stood out like a sore thumb in terms of, these guys knew what the hell they were doing. But when I -- can you all tell me, why did they fire him?

MR. KIM: Let's go off the record.

[Pause]

MR. H. FOSTER: Okay. But I just want to make it clear that when I used that phrase, Gary doesn't play well in the sandbox, that should not be interpreted by anyone as meaning that I have any negative opinions about him and his abilities as an attorney. I want to be perfectly clear that, in my professional judgment of over 30 years at the SEC, he was doing a terrific job on the Pequot investigation.

MR. J. FOSTER: So would it be fair to say then, whatever the issues were with him that led you to to make that comment, that they were outweighed by his performance on the substance?

MR. H. FOSTER: Right. And more importantly, to say that somebody doesn't play well in the sandbox, that doesn't have any -- what does that have to do with the price of tea in China? I mean, playing well in the sandbox -- not playing well in the sandbox does not mean that you disobey your superiors and whatnot.

What I meant by that was, you might not praise your supervisors when they tell you something that you don't agree with. I mean, if a supervisor comes -- if I'm a supervisor and I tell employee X to do something, and he says to me, you're crazy, but I'll do it, and he does it, fine.

It would be nicer if he didn't say your idea isn't as good as my idea, but it doesn't affect my opinion of his work as a professional. If he's doing good work, fine. What he thinks of me -- it would be nice if he thought I was the world's greatest person, but as long as he's doing the work on the case and as long as we don't have problems with disobedience or something, I don't have a problem with it.

MR. J. FOSTER: Gary Aguirre was listed on the

order, on the official Order of Investigation from the Commission, to issue subpoenas under his own signature. Correct?

MR. H. FOSTER: Yes.

MR. J. FOSTER: So if he were being insubordinate or wanted to go around his supervisors, he could have theoretically issued a subpoena to John Mack whenever he wanted to.

MR. H. FOSTER: Oh. Yeah. He could have, but that's not -- you know, you don't do that. I mean, no.

MR. J. FOSTER: And to your knowledge he didn't do anything like that?

MR. H. FOSTER: No. No, no, no, no. At no time at all did Gary come to me and suggest or indicate that he had done anything behind his supervisor's back or anything like that, you know. He would -- you know, he would run the thing of the flagpole. When it got shot down, he wouldn't be a happy camper, but he'd run it up the flagpole instead of trying to do something behind the back door, or something.

MR. J. FOSTER: I want to go back to the issue of whether to take John Mack's testimony, and when, and ask you about, in your experience at the Commission, in all the insider trading cases that you have worked on before, has it ever been described to you that there

should be a necessary prerequisite that you established that a potential tipper had access to material non-public information before you take that potential tipper's testimony?

MR. H. FOSTER: Well, no. But in this case that misses the point, because I think it was clear that Mack was in a position to know. Whether he did know or did not know, I don't know. But he was a player.

MR. J. FOSTER: So if there's enough circumstantial evidence, that they could --

MR. H. FOSTER: Circumstantial evidence. Because it's a two-way street. As an investigator, you want to lock people in as soon as possible because they'll come in and they'll say, look, I worked for Morgan Stanley, I worked in this place, but I was in Hong Kong, lost on an island, and didn't have a cell phone, you know. But you want to know that sooner rather than later.

MR. J. FOSTER: Uh-huh.

MR. H. FOSTER: I always said you want to take testimony from these people sooner rather than later because you lock them in.

MR. J. FOSTER: Uh-huh.

MR. H. FOSTER: And you're not going to get -- you're not going to prove your case and then go talk to

these people. I don't understand the justification for waiting.

MR. J. FOSTER: So were you aware at the time that Gary Aguirre's supervisors were telling him that there was a necessary prerequisite that he establish -- I don't know by what standard, but that he establish that Mack had access --

MR. H. FOSTER: No.

MR. J. FOSTER: -- to the information about the merger?

MR. H. FOSTER: No. I don't -- I don't remember Gary telling me that, no.

MR. J. FOSTER: Do you know any other way?

MR. H. FOSTER: I wouldn't know that.

MS. MIDDLETON: His supervisors were Mr. Hanson --

MR. H. FOSTER: Yeah.

MS. MIDDLETON: -- and Berger and Krietman. Did they have a lot of experience with insider trading and tipping cases, to your knowledge?

MR. H. FOSTER: Mark Krietman is one very smart guy, there. He was in the Trial Unit, and whatnot. He has tried all sorts of cases. How many insider trading cases he's tried, I don't know.

But the issue of whether or not he had

experience would be a non-issue, because he was one of the "wise old men", in a sense. The other two probably had some investigative experience and whatnot.

You see, the trouble I have is that I carved out a niche for myself as being the guru of insider trading, and I had a -- I wrote a book -- not a book, but a manual, on how to do it. I've trained thousands of people in the United States and abroad on how to conduct investigations on insider trading cases. But there's no -- there's always more than one way to skin a cat. So if people come to me, I'd say, this is what I would do. If people do other things, that's up to them.

MR. J. FOSTER: Did you ever discuss with anyone, around the time that Gary Aguirre started attempting to get approval to take Mr. Mack's testimony, the fact that Mr. Mack was being considered to be the head of Morgan Stanley?

MR. H. FOSTER: No. No. That wouldn't have -- that wouldn't have made any difference to me.

MR. J. FOSTER: Did anybody else mention it to you as to something that should make a difference, or did anyone mention it to you at all?

MR. H. FOSTER: I don't have a recollection of that, no.

MS. MIDDLETON: I know this is just asking for

your opinion, maybe, but do you think the reason his supervisors were not letting him do what he wanted in connection with taking Mr. Mack's testimony had to do with personality disputes, or who Mr. Mack was, or that they had more expertise? Do you have any opinion on that?

MR. H. FOSTER: It's speculation, but I'll give it to you anyway. I suspect they wanted to weigh in and basically establish that they were in charge of the investigation and that this guy Foster was out there, that Foster's a fine guy, but it ain't his case.

That's -- I'm trying to find out why someone would not want to take this guy's testimony sooner rather than later, and there's no answer that makes sense to me. There might be answers that make sense to other people, but to me it would be a shame if this thing turns out to be politically motivated, if you know what I mean.

MS. MIDDLETON: Yeah.

So you think that --

MR. KIM: It would be illegal. [Laughter].

MS. MIDDLETON: Yeah

MR. H. FOSTER: Okay. And illegal.

MS. MIDDLETON: And illegal. That, too.

So you think it may have had something to do with your involvement as opposed to --

MR. H. FOSTER: I don't -- I'm speculating. I don't know.

MS. MIDDLETON: Okay.

MR. H. FOSTER: I don't know. I don't know. But I -- look, I'm not chumsy with management. I'm sort of a rogue cowboy, you know. So people -- I had this notion that people said, oh, that's Foster. He's a loose cannon, you know. Let him do his thing, but don't let him screw up our thing. But the problem with that approach is, I've done my thing and we got a lot of big insider trading cases.

MS. MIDDLETON: Do you think they viewed you as a loose cannon?

MR. H. FOSTER: I don't know. I view myself as a loose cannon.

MS. MIDDLETON: Okay.

MR. KIM: Were you ever told that you were a loose cannon by anyone at the SEC?

MR. H. FOSTER: No. The closest thing to that, was it was reported to me that I had done something rather unique and one of the Branch Chiefs said to a friend, well, he's not my problem. [Laughter].

And I'll tell you what it was. We had -- it was an insider trading case, and the issue was, you know, well, do you take this person's testimony or not? I

said, no, let's call them up on the phone right now.

So I called this woman up on the phone and I basically say, why did you buy this stock? And she gives me her answer. I say, now, is that the only transaction you had in this stock? And she said, yes.

But I'd done the research and I knew she had a separate account somewhere, and I'd set it up so she didn't know that I knew about the separate account. Then I asked the question, did you have any other accounts, and she said no.

Then I laid into her, saying, look, lady, I've got a copy of this other account, and under Title 1903, whatever the hell it is, you've just lied to an official, and this is what I want you to do.

When you get off this phone, I want you to go to a securities lawyer. I want you to tell the securities lawyer what questions I asked and what answers you gave, and then I want him to call me, sooner rather than later.

Now, staff at the SEC had never seen anybody do anything like that, so they thought this was the craziest thing in the world. I had it on the speakerphone. So I said to the people in the room who all thought I was crazy, any bets as to what happens next? I said, I'll tell you what's going to happen next. We're going to get

a call within three days.

We got a call within three days. It was a great insider trading case. It turns out that her ex-boyfriend had given her the money to open the account and whatnot, and had kept all the profits. And it could all be documented, and whatnot.

MS. MIDDLETON: Yeah.

MR. H. FOSTER: But the point being, I am a loose cannon in the sense that I will take creative ways of doing things instead of just, you know -- but --

MR. J. FOSTER: Not necessarily by the book.

MR. H. FOSTER: Well, by the book. I wrote the book, so it was by the book. [Laughter]. No, seriously. I mean, most people are government bureaucrats. They want to do their time and get out and go into a law firm. I wanted to protect the public and solve cases and, you know, whatever. And we didn't sue that woman because she was an innocent victim.

MR. KIM: Mr. Foster, you had mentioned right as I came in that around the time you had left in July of 2005 --

MR. H. FOSTER: Five.

MR. KIM: -- that you had some thought process about a conflict of interest with an SEC employee who was on his way out, or her way out, into private practice and

may have had a conflict of interest. Is that --

MR. H. FOSTER: Yes. And that was -- I've been thinking about that, trying to pin that down, and I can't. But, I mean, if I were in your shoes I would ask whether there were people in the chain of command who left, and where did they go, and did they have any -- it might just be a complete rabbit trail, as we say. But --

MR. KIM: But you had this -- did you have this feeling and this thought process while you were at the SEC?

MR. H. FOSTER: I don't think -- no. No. No, I don't think it was while I was at the SEC.

MR. KIM: So it was after you left the SEC.

MR. H. FOSTER: Yeah. Yeah. Yeah.

MR. J. FOSTER: Did you know Paul Berger?

MR. H. FOSTER: Not well. If he walked in the room I would recognize him, but I might not be able to put the name to him. I don't think I've had five conversations with Paul Berger in my life.

MR. J. FOSTER: Is it possible that Paul Berger is the person you were thinking of?

MR. H. FOSTER: Quite possible.

MR. J. FOSTER: Back just before you retired in the summer of '05, when Gary Aguirre was trying to get approval to take John Mack's testimony, at that time you

said earlier that you had gone through a lot of e-mails --

MR. H. FOSTER: Yeah.

MR. J. FOSTER: -- and you and Gary had this sort of competitive --

MR. H. FOSTER: Hundreds of thousands. Yeah.

MR. J. FOSTER: Competitive relationship --

MR. H. FOSTER: Right.

MR. J. FOSTER: -- to find the nugget, you know.

MR. H. FOSTER: Right. He might not have viewed it as competitive, but I was -- to me it was competitive.

MR. J. FOSTER: Friendly competitive. Right.

MR. H. FOSTER: I was -- I was upset that somebody came in and was doing a better job at insider trading than I was. I mean, that -- that's a fact. I mean, you know. I said, time for me to retire. [Laughter].

MR. J. FOSTER: So based on all that document review that you did, I mean, were you aware in the summer of '05 whether there was a good case that there was someone else who may have tipped Arthur Samberg about the GE-Heller merger? Someone other than John Mack?

MR. H. FOSTER: There's always that

possibility. There's always a possibility that people have two sources, not just one. Do I -- as I sit here do I recall that? No. But, you know, whatever was in the e-mails that we were looking at, you know, Aguirre would have brought me the relevant e-mails and I would have seen them, and I would have said, oh, yeah, this guy works there too, so this is a possibility. But as I sit here today, no. As I sit here today --

MR. J. FOSTER: Did you agree with Gary Aguirre's assessment that John Mack was the most likely tipper among whatever possibilities there were?

MR. H. FOSTER: I don't think there was one suggestion or idea that Gary made that didn't make a hell of a lot of sense to me. In other words, he would not shoot from the hip. He would -- when he said something, I listened, he was that good.

MS. MIDDLETON: I want to ask you, you mentioned that you told Linda Thomsen that this was a big investigation.

MR. H. FOSTER: Uh-huh.

MS. MIDDLETON: Could you elaborate?

MR. H. FOSTER: Not big, significant.

MS. MIDDLETON: Yeah. Was it the volume of the --

MR. H. FOSTER: No, no, no. It's the fact that

you've got an institution -- you have one of the largest hedge funds in the country that has been around forever, and has a portfolio of a billion dollars, or whatever it is, and if they're engaged in systemic insider trading, that's news. That's something that the SEC should be involved in.

And then to me, I'd always been skeptical because they would always get these high rates of return. You know, how do you beat the market that consistently?

MS. MIDDLETON: Was the volume -- given that it was a $7 billion -- or I don't know whether it was at the time, but --

MR. H. FOSTER: The volume -- the potential profits were, you know, were in the scores of millions of dollars.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: The number of deals were over a dozen. The players were the white shoe firms. This was not a mom-and-pop operation. This was out of Connecticut. This was, you know, Greenwich, Connecticut, the home of a lot of your major hedge funds, and whatnot. And if I were the Division Director I'd want to know about this case. I remember, I said, well, she must know about it. But then I said, well, I want to make sure she knows about it.

MR. J. FOSTER: Did she know when you told her? Had she already --

MR. H. FOSTER: I don't recall. I don't recall whether she indicated she knew or didn't know.

MS. MIDDLETON: Did you consider the trading by Pequot in GE and in Heller stock to be suspicious, aberrational, or --

MR. H. FOSTER: Well, it was not aberrational. That's the problem. Was it suspicious? Yes. You see, that's the problem.

MR. KEMERER: That's the problem of proof with respect to hedge funds, right?

MR. H. FOSTER: Right. Right.

MR. KEMERER: Because they have so much volume.

MR. H. FOSTER: Exactly. Exactly.

MR. KEMERER: What if it's aberrational for that hedge fund? In other words, that hedge fund doesn't usually trade in that --

MR. H. FOSTER: Trade in that industry. I hadn't done that type of analysis, but I was operating on the assumption that they traded in just about anything, especially anything that could be a take-over target.

MR. KEMERER: But that would be one indicia of aberrational trading, at least with respect to a hedge fund.

MR. H. FOSTER: Yeah. Yeah. Yeah. Yeah. I mean, if someone had done an analysis and found out that this was the only time he traded in a company in this industry --

MR. KEMERER: Right.

MR. H. FOSTER: -- that would be significant from an investigative standpoint.

MR. KEMERER: And with respect to the timing, I mean, all these trades on both sides, you know, shorting GE and --

MR. H. FOSTER: Oh, yeah. Yeah.

MR. KEMERER: -- and going long on Heller, all within a month before the deal is announced --

MR. H. FOSTER: Oh. That sticks out like a red -- like a sore thumb.

MR. KEMERER: So it's very serendipitous, in other words.

MR. H. FOSTER: Suspicious.

MR. KEMERER: Right.

MR. H. FOSTER: Yeah. Timely.

MR. KEMERER: Yeah. Timely.

MR. H. FOSTER: Fortuitous.

MR. KEMERER: There you go. Fortuitous.

MS. MIDDLETON: Were you present for Mr. Samberg's depositions?

MR. H. FOSTER: Yes. At least, I don't know if he went two days. I know I was there for one day.

MS. MIDDLETON: Did -- what did you think of how Gary -- Gary took the deposition. Is that right?

MR. H. FOSTER: Yeah. I don't think I asked one question.

MS. MIDDLETON: And how --

MR. H. FOSTER: Testimony can be very laborious. Different people have different styles.

MS. MIDDLETON: What did you think of his skills in terms of taking testimony at a deposition?

MR. H. FOSTER: I thought he took testimony the way most good SEC attorneys take it. Now, is that the same as saying, did he take it the way I would take it? Not necessarily. It went very long. It was very belabored, very meticulous. But that's a sign of thoroughness.

Sometimes -- sometimes when I take testimony, the transcripts come back and it's 20 pages long and people say, why did you only take 20 pages? I said, because that's all that's relevant. Other people come back and it's 400 pages, and they're asking, you know, where did you go, what did you eat yesterday. I don't know.

But, I mean, did I think -- did I have a

problem with the testimony? No. Did I think it was laborious? Yes. Have I see other people do it that way? Yes. Did I think anything happened in there that was unusual or unprofessional? No.

What do I recall? I recall that Stan Sporkan was there at one of these things and Stan asked a very precise and clear question about something, and it turned out that that question, you know, obviated the need for a lot of other questions. But the point being, it was a long and tedious process. He was very thorough and very prepared.

And there were a lot of lawyers sitting around. I'm just sitting there saying, boy, the meter is running. The meter was running. There had to be five or six lawyers there, and they all had to be doing out at 700 bucks. But it's the cost of doing business, you know. If you hit 18 deals, you can afford

MS. MIDDLETON: As far as what Mr. Samberg actually said --

MR. H. FOSTER: Yeah.

MS. MIDDLETON: -- do you recall whether he had any explanation for why he did the trading, or --

MR. H. FOSTER: I recall that there was -- there was something that didn't make a lot of sense, but I'd have to go back and look at the transcript now. But

he had explanations for some things, but there were points that he didn't have explanations for, as I recall. As I recall.

MR. J. FOSTER: Do you recall having a disagreement with Gary Aguirre, either during the testimony or during the break, about how he was proceeding?

MR. H. FOSTER: I might have said, you know, it's Friday; how long are we going to go?

MR. J. FOSTER: Do you recall having a heated discussion with him, an argument, or either of you yelling at each other?

MR. H. FOSTER: I've been known to yell, but I don't recall it. If you tell me what it was about, it might refresh my recollection.

MR. J. FOSTER: Did you yell at him about -- during the first testimony, about him asking about what documents that the lawyers had shown to the -- to Mr. Samberg in preparation for the testimony?

MR. H. FOSTER: I remember something came up and there was an issue as to which way to go, and I think -- there was something that came up but I don't remember how it was resolved. But it wasn't something that I remember now. But the point being, there's always two or three different ways to do things.

And Lord knows, I do things differently than a lot of people, so the fact that we would have had a disagreement doesn't surprise me. What it was specifically, I don't remember, but I do think whatever it was, it got resolved to everyone's satisfaction.

MR. J. FOSTER: Do you recall that, over the course of the two testimonies, that Gary Aguirre established that the reasons that Mr. Samberg gave in his first testimony for why he purchased Heller had been --

MR. H. FOSTER: Negated?

MR. J. FOSTER: -- spoon-fed to him by his attorneys years later?

MR. H. FOSTER: Yes. Yes. Yes. I remember being impressed with the way that Gary did the testimony, in the sense that it took a long time, but I remember feeling that he got to where he wanted to be.

MR. J. FOSTER: Did you ever tell Gary that you were going to use part of that transcript --

MR. H. FOSTER: Yes.

MR. J. FOSTER: -- in training?

MR. H. FOSTER: Yes, I think I did. I think I did. I think I did. It was -- yes. Yes. That refreshes my recollection.

MR. J. FOSTER: Okay.

MR. H. FOSTER: Indeed. Indeed.

MR. J. FOSTER: And do you recall anything else about it?

MR. H. FOSTER: Only that it was that good.

MR. J. FOSTER: And it was that portion dealing with the issue of --

MR. H. FOSTER: It was whatever it was. But there was some portion there where I said, this is dynamite stuff here. This is the way to do it. I remember that, saying I want this -- because you're always looking for things to put into manuals, and whatnot. Yeah. I do remember that, but I don't remember specifically what it was. But I remember having that thought. Yeah.

MR. KEMERER: Let me ask you a question about the Mack testimony issue. I think you said, if somebody had asked you -- like one of the supervisors had asked you, when should we take Mack's testimony, you would have said something like, yesterday.

MR. H. FOSTER: Right.

MR. KEMERER: And that probably had to do with the strategy of trying to nail people down.

MR. H. FOSTER: Right.

MR. KEMERER: Probably had, maybe, something to do with the impending statute of limitations, which I don't know if -- you know --

MR. H. FOSTER: Well, I think the statute of limitations might apply to some of the deals, but not to all of the deals. I wasn't really worried that much about statute of limitations.

MR. KEMERER: Okay. Because there was still the option of disgorgement --

MR. H. FOSTER: Yeah. That's it exactly. The statute of limitations would not have killed the case. It might have killed part of the remedy.

MR. KEMERER: Right. So it would have killed the criminal part, that's for certain. Right?

MR. H. FOSTER: Yeah. But I -- you know, that's not --

MR. KEMERER: Yeah.

Now, would there have been any harm in taking Mr. Mack's testimony either last June or last July when Mr. Aguirre initially proposed it?

MR. H. FOSTER: Any harm?

MR. KEMERER: Any potential down side?

MR. H. FOSTER: The only potential down side that I would see is, which you always have, is you bring someone in, you take testimony for a day or two, and then something comes up and you've got to bring them back for more testimony. But that's always the case, unless you wait till the end.

MR. KEMERER: And if you hadn't taken it in the first place you'd have to bring him in anyway, right?

MR. H. FOSTER: Right. Right. Right.

MR. KEMERER: So the potential down side was de minimis. Would you agree with that?

MR. H. FOSTER: Yeah.

MR. KEMERER: Let me ask you, I mean, you've told us a lot about Mr. Aguirre's sort of work ethic, quality of work. How about Bob Hanson? How well do you know Bob Hanson?

MR. H. FOSTER: Not well at all.

MR. KEMERER: Okay.

MR. H. FOSTER: I don't think I've had three conversations.

MR. KEMERER: Never really reported to him?

MR. H. FOSTER: Never reported to him. Never saw his work.

MR. KEMERER: Okay.

MR. H. FOSTER: Don't know what his reputation is.

MR. KEMERER: Okay.

And I recall you saying that Mr. Krietman was one of the "wise old men".

MR. H. FOSTER: Yeah.

MR. KEMERER: He was very experienced.

MR. H. FOSTER: Yeah.

MR. KEMERER: Good reputation.

MR. H. FOSTER: Yeah. And he was the type of guy that I remember, he was, many, many years, a litigator.

MR. KEMERER: That's right.

MR. H. FOSTER: Then he came into Enforcement. But he was -- he had a lot of institutional knowledge.

MR. KEMERER: Right.

MR. H. FOSTER: A lot of institutional knowledge.

MR. KEMERER: And you said you probably only had maybe five conversations with Paul Berger.

MR. H. FOSTER: Right.

MR. KEMERER: So if I were to say, well, Mr. Foster, what do you think of Paul Berger's work product, you probably wouldn't --

MR. H. FOSTER: I'd say I don't know.

MR. KEMERER: Right. Okay.

Now, with respect to Linda Thomsen, had you worked with her or under her?

MR. H. FOSTER: No. No.

MR. KEMERER: Okay.

Now, obviously, she's the Director of Enforcement, and you're in Enforcement. You're somewhere

down there.

MR. H. FOSTER: I'm in there. I'm a self-described worker bee.

MR. KEMERER: Worker bee. Okay.

MR. H. FOSTER: That's what I am. Or was.

MR. KEMERER: And I think you said nobody ever really talked to you about Mr. Mack's -- nobody in a supervisory role ever really talked to you about Mr. Mack's political clout or anything.

MR. H. FOSTER: Correct.

MR. KEMERER: What about Mr. Aguirre's instincts? I mean, you seem to give him a lot of credit with respect to his intellect and his work ethic. What about his instincts? Do you think, as a litigator, he had pretty good instincts?

MR. H. FOSTER: I never saw him as a litigator. As an investigator.

MR. KEMERER: Investigator.

MR. H. FOSTER: I don't think his instincts were as good as his other skills.

MR. KEMERER: Why is that?

MR. H. FOSTER: Well, instincts are funny things. I mean, I think Gary was very good at covering the waterfront, being very meticulous. I think instinct is the ability to understand and recognize what is truly

diagnostic evidence, what really matters, what is the decision going to be made on. Very few people have that. I like to think that I have that, because God knows I don't have, you know, good writing skills and other stuff. [Laughter]. But you asked about his instincts, and that's my answer.

MR. KEMERER: Okay.

MR. H. FOSTER: That's my answer.

MR. KEMERER: Okay.

Let me ask a separate, but to me related, question. I think if I were to go ask the SEC, all these supervisors today, you know, you folks have read the *New York Times* article in which Mr. Aguirre is quoted. It's about Samberg, it's about Mack. What do you make of that? They would say, I presume -- I'm not representing to you what they have said.

MR. H. FOSTER: Right. Right.

MR. KEMERER: I'm saying, they would say, perhaps even if I wasn't around, he's a conspiracy theorist. Mr. Aguirre sees things that aren't there. Right? And, you know, any suggestion that this was politically motivated or that we were unduly influenced is just so much hoopla, you know.

So I guess what I'm asking you is, did Mr. Aguirre expound upon certain linkages in ways that

couldn't be supported by reasoned thinking?

MR. H. FOSTER: No. Not -- not that I recall, no.

MR. J. FOSTER: Would you describe him as a conspiracy theorist or prone to seeing conspiracies that weren't there?

MR. H. FOSTER: I was trying to figure out what his take was that led him to file the age and race -- the EEO complaint initially. And the best I could come up with was: A) he was qualified--obviously qualified--to do the work; and B) I'm sitting there saying, why would these people not hire someone like this?

MR. J. FOSTER: Uh-huh.

MR. H. FOSTER: And the answer I came up with, without speaking to the people who made the decision, or anything, but my speculation was, well, here's a guy who's 61 years old, or 65, whatever the hell it is.

He's going to be coming in. He's going to be working with people who know that he doesn't know much about securities investigations, but at the same time he probably has a much broader experience and background than they do, so he's going to be difficult for those people to work with. It's going to take a hell of a supervisor to work well with someone like that.

And I think he was not hired because people

didn't want to get off the normal train, which is, you bring a kid in right out of law school, or whatever, and you build that kind of -- you bring in somebody who is that good and you put them at an investigative level, he's going to be difficult. Or to put it another way, are you prepared as a manager to deal with those challenges?

And I think people said initially, do we want to deal with those challenges when we've got, you know, 10,000 other people as qualified? And I think they said, no. Then he filed this lawsuit, and they said, whoops, we don't have a good reason for not having done this. So, he ends up there and you have a classic situation, in my judgment, of people trying -- not knowing how to be a good supervisor with an employee like that who is obviously talented.

So I flip it around. Was he a bad employee? No. Were they sophisticated enough in terms of their ability to deal with him? I don't think so. Does that make anybody a good person or bad person? You know, that's not the issue. That's reality. That's my personal opinion.

Now, this other business about whether there was any political stuff there, that's something completely different. If there was something political

there, then not only is it a shame, it's illegal. But I don't know.

MS. MIDDLETON: Were you aware of some problems he was having with the supervisor he had before he began reporting to Mr. Hanson and Krietman? He was moved from one supervisor.

MR. H. FOSTER: Who was he moved from?

MS. MIDDLETON: Kane.

MR. H. FOSTER: I wouldn't know Charles Kane from --

MR. J. FOSTER: And Richard Grimes.

MR. H. FOSTER: Grimes.

MS. MIDDLETON: Grimes.

MR. H. FOSTER: Yeah. I -- I've heard the name Grimes. I wouldn't recognize Mr. Grimes if I saw him.

MS. MIDDLETON: So Gary never talked to you.

MR. H. FOSTER: No, he never talked to me about it.

MS. MIDDLETON: The referral on the Pequot trade. I mean, Gary started investigating, you said, in the fall of --

MR. H. FOSTER: Well, that's when he came to me. I don't know when he was -- my impression was that the investigation had just started then, but --

MS. MIDDLETON: Right.

MR. H. FOSTER: But I don't know that for a fact.

MS. MIDDLETON: Right.

MR. H. FOSTER: Okay.

MS. MIDDLETON: But let's say it did.

MR. H. FOSTER: Okay.

MS. MIDDLETON: Did you ever have any discussions with Gary about when the referral had been made or that it had been sitting around for a long time or anything along those lines?

MR. H. FOSTER: I might have, because I know I would have said, God, another Pequot referral? I wonder how many of those we have. Let's find out. So, yeah.

MS. MIDDLETON: But nothing about it sitting around, or --

MR. H. FOSTER: No.

MS. MIDDLETON: I'm thinking about the statute of limitations question. It does seem like the --

MR. H. FOSTER: No. The issue would be, what is the date on the referral from the --

MS. MIDDLETON: Right.

MR. H. FOSTER: -- from the exchange. And if the date is five years old, that's one thing, but if it just came in last week, that's another thing.

MS. MIDDLETON: And you don't recall that?

MR. H. FOSTER: I don't recall the date of the referral.

MS. MIDDLETON: Okay.

MR. J. FOSTER: Why would there be --

MR. H. FOSTER: A time lag like that?

MR. J. FOSTER: Yeah.

MR. H. FOSTER: Because in some instances the SROs will conduct their own investigation. They have jurisdiction over brokers and dealers, and whatnot. They don't have jurisdiction over hedge funds. So they might have been looking at Morgan Stanley, or God knows what, and then finally, you know, make a referral. I mean, it's all over the line. I've gotten referrals from the exchanges on the same day of the trading, and I've seen them come in three or four years later.

MS. MIDDLETON: You said that the SROs don't have jurisdiction over the hedge funds.

MR. H. FOSTER: Right.

MS. MIDDLETON: But they would pick up the trading.

MR. H. FOSTER: Yeah. Yeah. Yeah. Yeah. Yeah. The role -- the primary role that the SROs have in insider trading, as far as I'm concerned, is their ability to analyze every trade. They get a run of every trade. They push a button, they see who bought the most,

they see who's connected, this kind of stuff.

But in terms of who are they regulating, they're regulating the brokers and dealers. So if Stephanie or someone is trading, they can refer that to us. The same as if it's a hedge fund, they can refer that to us. If they think a broker-dealer is involved in some kind of mischief, they'd want to take a crack at doing that themselves.

MR. J. FOSTER: But when you say they don't have jurisdiction over their hedge funds, do you mean that they --

MR. H. FOSTER: They cannot sanction.

MR. J. FOSTER: Right. So they wouldn't have been, then, going and getting documents or interview people from --

MR. H. FOSTER: Right. They don't have -- they can't -- they can't subpoena.

MR. J. FOSTER: Right.

MR. H. FOSTER: They don't have the ability to compel the production of testimony or documents from anyone other than whatever it is they're regulating, the exchange or the broker-dealer.

MS. MIDDLETON: When you were talking about Gary's instincts, that brought to mind something else. Did you ever find him to sort of mischaracterize or

misstate what evidence he was actually finding?

MR. H. FOSTER: Absolutely not. Absolutely not.

MR. J. FOSTER: Were there any serious errors that he made when he was doing his evidence summaries for his supervisors, or for you, or --

MR. H. FOSTER: None that I was aware of

MR. KEMERER: When you introduced Mr. Aguirre to Ms. Thomsen, do you recall if she said anything, other than just sort of smiled and shook his hand?

MR. H. FOSTER: I think that was it.

MR. KEMERER: Yeah.

MR. H. FOSTER: And it was -- I didn't even -- I probably -- I know I did not mention the name of the hedge fund, because it was a semi-public place. It was the back room of the Capitol Grille, or something, so I'm not going to be dropping names here.

MS. MIDDLETON: I want to change the focus for just a second. When you all work with the U.S. Attorney's Office and make -- is it called criminal referral? Could you describe that process and how it works, and whether it works?

MR. H. FOSTER: Okay. Many, many years ago, the only way you could do a referral, was you had to write a 50-page report and get 75 people to sign off on

it. And, you know, 20 years ago or less you had -- we sort of abandoned that and started using the informal referral, which is, you basically pick up the phone and you say, Mary Jo White, or whoever you're talking to, I've got a live one here, I think you guys are going to be interested. I've got it packaged up with a bow tie on it and we'd like to come up and talk to you about it. That's where you've already done everything.

There are other situations where you think you have something, but it's not packaged up yet, and as an investigator you're reluctant to talk to them, in a sense, because they're going to take it over. But justice -- you know, equity requires that you bring what looks like a serious criminal matter to their attention sooner rather than later, so you go up and you explain what it is, and then they'll say, okay, we'll take the ball from here, you know.

Then you say -- but in answer to your question, how does it work, you pick up the phone, you call the U.S. Attorney's Office that would have jurisdiction, and you explain the situation. If they're interested, they will invite you up. They don't come down. You go and see them and you prepare a little outline and explain to them what it is.

MS. MIDDLETON: And if they say -- if they are

interested, you continue to work with them. Is that --

MR. H. FOSTER: Yeah. Yeah. It's a parallel situation where, essentially, you are doing your own civil investigation and they are doing whatever it is that they do and they don't want you to screw up what they do.

MS. MIDDLETON: Do you all, like, step on each other's toes ever, or is it a perfect system?

MR. H. FOSTER: Well, no, it's not a perfect system, because sometimes you'll want to do something and they'll say, hold off on that.

MS. MIDDLETON: Uh-huh. Uh-huh.

MR. H. FOSTER: And usually you do hold off on it. Usually.

MS. MIDDLETON: Okay. But that seems reasonable.

MR. H. FOSTER: Yeah. Yeah. Uh-huh. It's the way the world works.

MS. MIDDLETON: In this case, in the Pequot investigation Gary was doing, were you involved in the meeting that he had with the U.S. Attorney's Office?

MR. H. FOSTER: I'm trying to think. I know I went to New York to talk to the SROs. I have a recollection that there was a meeting with the U.S. Attorney's Office. I'm not sure I was there or not.

MS. MIDDLETON: You said you'd do the referral if there's a serious criminal --

MR. H. FOSTER: Potentially.

MS. MIDDLETON: Potential. Yeah. And did you think this was that, or did Gary consult with you?

MR. H. FOSTER: Well, if -- let's put it this way. It's the elephant in the room that people are finally beginning to look at. And, you know, if you can reach out and touch it and say, yeah, this thing is here, it's big, big, big. The question would be, is it an investigator's pie in the sky or is this really something that looks like you ought to be able to prove it?

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: And so maybe at that point the statute of limitation questions become more important, because that goes to all of their remedies as opposed to only some of our remedies.

MS. MIDDLETON: Do you know whether -- so you don't know whether you went up to the meeting.

MR. H. FOSTER: I -- I have been to so many of those meetings. I don't recall, no. If you name somebody or tell me. Did I go or not?

MR. J. FOSTER: Well, I don't know if this will help or not, but here's a document. We'll mark it and put it in the record. Exhibit 29.

(Whereupon, the document referred to as Exhibit No. 29 was marked for identification.)

MR. J. FOSTER: This is an e-mail from Mark Krietman to you, Tuesday, February 22nd, 2005. And he says, "If we can interest the Southern District again, that would be a very high priority."

MR. H. FOSTER: Let me just finish reading it.

MR. J. FOSTER: Sure. Go ahead.

MR. H. FOSTER: Is this -- did I write this? I didn't? Okay. Let me read it. [Pause]. Okay. What's your question?

MR. J. FOSTER: Well, first of all, Mr. Krietman says, "If we can interest the Southern District again". Do you recall if there were times where the Southern District was interested and then became not interested, and then you had to re-interest them in the case, or --

MR. H. FOSTER: I don't. I don't.

MR. J. FOSTER: Okay.

And who is Lachman, L-A-C-H-M-A-N? Do you know?

MR. H. FOSTER: Oh, Jesus. I don't remember.

MR. J. FOSTER: Do you even recall if this is related to GE-Heller or not?

MR. H. FOSTER: If -- if -- well, it's Prim Lachman. That's what it says up there, "Pequot - Prim Lachman" on the top. It has to be related to Pequot because that's the only thing I was dealing with Gary on.

MR. J. FOSTER: Okay.

MS. MIDDLETON: But you don't --

MR. J. FOSTER: But there other aspects of the Pequot investigation not focused on GE-Heller trades, as far as work on that.

MR. H. FOSTER: Right. Right. Right. Right. Right. And whether this was GE-Heller, I just don't recall.

MR. J. FOSTER: Okay.

MS. MIDDLETON: Do you know whether Gary ever discussed the GE-Heller trading by Pequot with anyone in the U.S. Attorney's Office?

MR. H. FOSTER: If he had a meeting with him he would have, but I don't recall otherwise.

MS. MIDDLETON: Okay.

MR. KEMERER: Mr. Foster, I think you said something -- I'm paraphrasing here. I think you said, most people -- I think you were talking about SEC folks. Most people are government bureaucrats. They want to do their time, get out, and go to a firm. I wanted to protect the public.

Do you think that that's Mr. Aguirre's philosophy as well, that he wanted to protect the public?

MR. H. FOSTER: I think Gary wanted to do the best job that he could on this case. I think -- I don't know. I don't feel comfortable judging whether he is passionate about protecting the investing public or not. I feel comfortable saying he wanted to do a good job with this.

I mean, if he wanted to protect the investing public, he might have found his way to the SEC sooner. But I think he was committed to doing a good job. I don't think his mantra every day was, you know, the poor investing public. But obviously he wanted to do a great job on this case, if that answers the question.

MR. KEMERER: It does.

MR. H. FOSTER: Okay.

MS. MIDDLETON: Do you think that there's sometimes -- the lawyers at the SEC investigating a case, or might sometimes pull their punches because they expect that they're going to be on the other side or will be looking to work for some of the firms that they're dealing with on the other side of the table during these cases? Is that a concern?

MR. H. FOSTER: Is that a possibility? It's a possibility. The concern for me -- it was -- it was not

a concern for me because I wasn't ever looking to go outside.

MS. MIDDLETON: Well, no, you weren't. But --

MR. H. FOSTER: But the other people? I mean, I've heard people say that, but how do you -- people say that. Whether it's true or not, I don't know.

MS. MIDDLETON: People at the SEC say that?

MR. H. FOSTER: I've heard them say that.

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: I can't -- if you're asking who, when, where, what, I couldn't do that. But it's not a concept that's alien to me, let's put it that way.

MR. KEMERER: Are you aware of some economists or securities law experts having a theory that insider trading is really a victimless crime? Have you ever heard that?

MR. H. FOSTER: Oh, absolutely. Absolutely.

MR. KEMERER: Yeah.

MR. H. FOSTER: That is a major *Law Review* and -- I've read the *Chicago School*, the whole nine yards, and there's a very strong argument that can be made for that. But on the other hand, you're dealing essentially with, you're stealing someone's information.

And the way insider trading is set up now, it's only insider trading, in most instances, if someone is

breaching a duty of trust and competence. So if you have a breach of duty of trust and competence, then that breach, ipso facto, indicates that somebody's getting screwed. The irony is, it's not necessarily the investor, it's the owner of the information that's getting screwed.

MR. KEMERER: Uh-huh.

MS. MIDDLETON: Let me -- just a little bit off base, but along those lines, is it frustrating when you're investigating an insider trading -- potential insider trading case, that there's this breach of duty requirement there, such that, for example, if Mack got the information and he didn't work for any of these companies, or he just --

MR. H. FOSTER: If -- if --

MS. MIDDLETON: Is there a problem with the law --

MR. H. FOSTER: Well --

MS. MIDDLETON: -- that frustrates you?

MR. H. FOSTER: The frustration that the capitalists -- the capitalists have with the law is that it's not clear, what we're talking about. But when you put it under Section 10(b)(5), 10(b)(5) is an anti-fraud statute --

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: -- and anything having to do with fraud, you've got to talk in terms of breach of duty. Okay. So that's -- what happens is, the same trade can be illegal in one instance and legal in another instance based upon some peculiarities of the facts.

There's only one case where we solve that, and that is in the context of mergers and acquisitions, tender offers. There you don't have to go through a breach analysis because it's clear. The law says, if you have the information and if it came from an insider, then you have a violation.

Under 10(b)(5), if you have the information and trade, that's not the end of the inquiry, it's only the beginning. How did you get the information? Did you get it through a breach of duty? And if the answer there is yes, then you could be off and running and claim a violation.

MR. J. FOSTER: So in which instance is it with the GE-Heller trades at issue here?

MR. H. FOSTER: Well, you would -- if it -- my recollection is, GE-Heller was a tender offer, so you have both. You have the clear-cut 14(e) -- Section 14(e) of the Securities and Exchange Act of 1934, and Rule 14(e)(3), pick it up without having to do a duty analysis.

MR. J. FOSTER: So it wouldn't necessarily --

MR. H. FOSTER: But you would also -- you would also -- you would also charge 10(b) and 10(b)(5) and you would have to do the analysis.

MR. J. FOSTER: Well, let's just --

MR. H. FOSTER: But for all practical purposes, you're home free without having to worry about it.

MR. J. FOSTER: Right. So just hypothetically speaking then, let's assume that someone, Mr. Mack or someone like Mr. Mack, who may have gotten the information while being considered for a position and was not actually with the company that was involved in the merger at the time that he received the information, you're saying that that wouldn't have been necessary because of the way the law works.

MR. H. FOSTER: It could still be collected under 14(e).

MR. J. FOSTER: Okay.

MR. H. FOSTER: But if he didn't breach a duty, i.e., if he didn't agree to keep the information confidential, he would not be guilty of 10(b)(5).

MR. J. FOSTER: Okay.

MR. KEMERER: Before you left the Commission --

MS. MIDDLETON: I'm sorry. Can I just -- I just want to understand what he just said.

MR. KEMERER: Sure.

MS. MIDDLETON: You said if he didn't agree to keep it confidential.

MR. H. FOSTER: Yeah. If he --

MS. MIDDLETON: I mean, if he knew it was confidential, would that be enough to get him?

MR. H. FOSTER: Well, if he's not under -- where's the breach?

MS. MIDDLETON: Okay.

MR. H. FOSTER: It has to be a breach. Now, if -- if -- if I am the president of Heller, or GE, or something, and I tell Mack --

MS. MIDDLETON: Right.

MR. H. FOSTER: -- and I say to Mack, you know, I'm just telling you this because I want you to know where we are and everything, and do you agree to keep it confidential, if he says, no, I don't agree to keep it confidential and the president still tells him, if the president has the authority to tell him under those circumstances, then Mack is free to trade because there's been no breach of duty.

What typically happens is, the person acquires the information in the course of his work, the secretary for the lawyer. They all sign confidentiality agreements. Okay.

She gets the information legitimately, but she has, in effect, promised her lawyer that she will not use it for insider trading. So when she tells her husband about the information, she breaches that duty that she owes to the corporation.

The trader is guilty under 10(b)(5) if he knows, or should have known, that he's getting the information directly or indirectly through a breach of fiduciary duty, and if it's coming from the secretary to the lawyer and he knows that the secretary works at the law firm, he's in big trouble.

MS. MIDDLETON: So let me ask you this. If Mr. Aguirre's supervisors were saying, don't take Mack's testimony until we have proof that he's over the wall, or that he, you know, had some kind of duty, does that make any sense?

MR. H. FOSTER: Not at all if this were a tender offer case, and I think it was a tender offer case.

MS. MIDDLETON: It was GE buying Heller.

MR. H. FOSTER: Yeah. But it's the nature of the transaction. If it's a tender offer, that's a special type of deal, and 14(e) that I talked about addresses the tender offer situation.

MS. MIDDLETON: So you --

MR. H. FOSTER: But even if it's not a tender offer, you know, this business about waiting, I wouldn't agree with that, you know, let's put it that way. But he's dead wrong if this is a tender offer case because you've got him nailed, in theory, if it's a tender offer and he's got the information and he knows it comes from Morgan Stanley and he passes it on. If that's what happens, then he's dead under 14(e)(3).

MR. J. FOSTER: And that's because --

MS. MIDDLETON: Regardless of any breach of duty.

MR. H. FOSTER: Right.

MS. MIDDLETON: Okay.

MR. H. FOSTER: But you only pick him up -- you only go through the breach of duty analysis when you're concerned about 10(b)(5).

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: And while you can charge 10(b)(5) and 14(e) at the same time, if the 10(b)(5) charge falls out, so what? You still have the 14(e). The difficult case would be if this is not a tender offer. Then you do have to do the duty breach analysis. But the rationale for waiting until you've established that is a reasoning that I would not agree with.

MS. MIDDLETON: Okay.

And then just one more on this. In connection with working with the U.S. Attorney's Office on the criminal side, do they -- they just use mail and wire fraud, is that right? Or do they --

MR. H. FOSTER: No. All of the securities laws are enforceable as criminal violations, but they typically use mail and wire because they're easier.

MS. MIDDLETON: Because it's easier.

MR. H. FOSTER: Yes.

MS. MIDDLETON: So would they have to prove -- if they wanted to do a mail and wire fraud charge in connection with what you were looking at in Pequot --

MR. H. FOSTER: Yeah.

MS. MIDDLETON: -- could they -- could they just go with mail and wire and they wouldn't have to get into whether there was a breach of duty?

MR. H. FOSTER: I don't know exactly what the mail and wire is. But if they wanted to do a criminal case, they could do the 14(e), the securities law violation, tender offer violation, without having to worry about the breach of duty.

MS. MIDDLETON: Okay.

But if it wasn't a tender offer --

MR. H. FOSTER: If it wasn't a tender offer then they'd have to -- under the traditional 10(b)(5),

they'd have to find a breach of duty.

MS. MIDDLETON: Even with mail and wire fraud?

MR. H. FOSTER: Well, what's your mail and wire fraud if not a breach?

MS. MIDDLETON: Okay. So unless there's the breach of duty

MR. H. FOSTER: Right.

MS. MIDDLETON: -- you can't show the mail or wire fraud.

MR. H. FOSTER: That's right. Unless you've got people running around lying to investigators or something like that.

MS. MIDDLETON: Okay. Thanks.

MR. KEMERER: Mr. Foster, you've described yourself as sort of being sort of off on your own, not really directly reporting to someone too much.

MR. H. FOSTER: I might be puffing my horn too much, but, yeah. But that's true.

MR. KEMERER: Okay.

And at some point in the past you were a Branch Chief, right?

MR. H. FOSTER: Right.

MR. KEMERER: When, approximately, was that?

MR. H. FOSTER: I was a Branch Chief when I went to the Washington Regional Office in Arlington,

Virginia in the mid-'80s. They had a big EEO lawsuit in which an employee alleged that the office was all screwed up, and she won her case. And my suspicion is, as a result of that screw up, the office was closed and the people were brought into the home office.

When I came to the home office, I was a Branch Chief, but I was a Branch Chief who had come from this terrible place. So they said, let's contain these people. Let's not -- you know, let's isolate this problem.

And so I kept the staff that I had there, and that's when I developed this insider trading stuff. The powers-that-be at that time were impressed with the cases that my unit was bringing, and so I was a Branch Chief.

Then a friend of mine -- an acquaintance of mine from school, your Senator -- not your Senator, but Senator John Kerry, was running the P.O.W.-M.I.A. Committee investigations and they needed someone to come in and investigate fraudulent fundraising where they were telling the moms and dads, if you give us money, we'll go find and rescue P.O.W.s in Vietnam, you know, 20 years after the war ended. So I came over and I worked with his committee for six months, and when I went back I was no longer a Branch Chief.

MR. KEMERER: So the SEC said, we'll take you

back, of course, but we're not going to --

MR. H. FOSTER: They said you can go but we're not going to hold the Branch Chief position for you. I said fine.

MR. KEMERER: Okay. All right.

Now, at some point -- I mean, we discussed a moment ago the theory that some people hold, whether it's, you know, Easterbrook, Posner, whoever it is, that, you know, insider trading is a victimless crime.

Are there folk at the NAA -- I mean, the SEC who don't view insider trading as a crime with victims? Is there anyone in the institution of whom you're aware that says, oh, you know Hilton Foster and those insider trading cases, let's get at something else that's more important?

MR. H. FOSTER: I think different people like different types of cases.

MR. KEMERER: Right.

MR. H. FOSTER: I happen to like insider trading cases.

MR. KEMERER: Uh-huh.

MR. H. FOSTER: Are there people there who think insider trading cases are a waste of government money? Probably. Could I identify them? No.

MR. KEMERER: Couldn't identify them. Okay.

Okay.

MR. H. FOSTER: Because we bring about 65 -- or when I was there, we'd bring about 65 insider trading cases a year, and that was a significant -

MR. KEMERER: That's a good portion.

MR. H. FOSTER: And we got a good -- you know, good -- everyone likes to read those stories because they make interesting reading.

MR. KEMERER: They sure do.

MS. MIDDLETON: You were saying earlier that the interesting thing about hedge funds is all the relationships they have with investment banks and the law firms, and others.

So I'm back on this thing about breach of duty. If there's just cocktail party talk and nobody says, this is confidential, do you promise not to say it, I mean, are you saying that you couldn't -- that that means it's hard to do an insider trading case because somebody told his friend at the cocktail party that this deal is going to happen? And not a tender offer, but it's a deal.

MR. H. FOSTER: The way you handle that analysis is, was there a benefit to the tipper? In other words, are you just saying this to a room full of strangers or are you saying this to a room that includes your soon-to-be son-in-law --

MS. MIDDLETON: Okay.

MR. H. FOSTER: -- and you want to -- you see what I'm saying? So there's what's known as the benefit analysis.

MS. MIDDLETON: So if the tipper got a benefit, even if it's just a son-in-law --

MR. H. FOSTER: Right.

MS. MIDDLETON: -- or a close friend.

MR. H. FOSTER: Right.

MS. MIDDLETON: You don't have a problem. It doesn't interfere --

MR. H. FOSTER: You -- You -- that --

MS. MIDDLETON: -- with your ability to prove the case.

MR. H. FOSTER: Right. Right. Right.

MR. KEMERER: Is that what the Dirks case was about, like some sort of --

MR. H. FOSTER: Yeah.

MR. KEMERER: -- enhancement of your reputation.

MR. H. FOSTER: O'Hagen and -- yeah. Reputational enhancement is sufficient. Yeah.

MS. MIDDLETON: So then you could prove the mail and wire fraud if there was the benefit.

MR. H. FOSTER: Yeah. I don't know what -- I

don't know what you need for mail and wire fraud, but I know what you need for securities law violation.

MS. MIDDLETON: Okay.

MR. H. FOSTER: And that -- you could get that.

MS. MIDDLETON: Okay.

MR. H. FOSTER: Yeah. Yeah. The difficult case is, you're walking down the street next to a Skadden Arps office and a piece of paper floats down that says, you know, the merger is tomorrow, and you go out and you buy, have you violated the law?

MR. KEMERER: No.

MR. H. FOSTER: If it is a tender offer you have if the information came from Skadden --

MR. KEMERER: An insider.

MR. H. FOSTER: -- and Skadden was working for one of the parties. Okay. If the deal is not a tender offer and this thing floats down to you and you trade, you have not violated.

MR. KEMERER: Uh-huh.

MS. MIDDLETON: That's kind of weird.

MR. H. FOSTER: Yeah. That's why --

MR. J. FOSTER: Does it matter whether you know it's a tender offer?

MR. H. FOSTER: No.

MR. J. FOSTER: Does it have to be on the piece

of paper?

MR. H. FOSTER: No. The question is, was it a tender offer?

MS. MIDDLETON: Yeah.

MR. H. FOSTER: So, I mean, that's the question.

MS. MIDDLETON: Should it be that way?

MR. H. FOSTER: Should it be that way? Let me answer the question this way. It is important that people not run around and trade on all this price-sensitive information that's not available to the public at large. And if you own the information and whatnot, you should be able to trade on it freely because it's your information.

In theory, under this theory, if you want your employees to trade on it, maybe they should be allowed to trade on it, too. So there's no confidentiality agreements, or whatever. But then what you have is a wild west scenario, where you'd be crazy to invest in the market because it's rigged against you if you're not -- you know.

So I think insider trading should be outlawed. Do we do the best job of outlawing it? No. Other countries have much better laws, with weaker enforcement. So when I talk to the international people I say, copy

our enforcement techniques and convince Congress to copy your legislation.

MS. MIDDLETON: Because I just want to understand. You know, who knows where this investigation of the Pequot trading is going, whether it's closed or open. But it seems that Gary was --

MR. H. FOSTER: Gary -- the problem --

MS. MIDDLETON: Gary left more than a year ago and nothing's happened that we've heard about.

MR. H. FOSTER: Yeah. Let me comment on that. The problem with the Pequot investigation now, as I see it, is that you've got an investigation that is massive and you've got the guy who was running it and who was intimately aware of all the details, the directions, and the strategy, and whatnot no longer there.

So how are you possibly going to be able to bring someone in and do a bang-up job? I mean, in my personal opinion I'd be surprised if anything happened, simply because I'd see it as too easy to orphan the case now. Who would want to pick it up at this stage?

MS. MIDDLETON: Uh-huh.

MR. H. FOSTER: You know, perfunctory, you go out. Yeah. Okay. You take Mack's testimony for two days. Okay. The investigation is over.

MR. J. FOSTER: Do you know James Eichner?

MR. H. FOSTER: Who?

MR. J. FOSTER: James Eichner.

MR. H. FOSTER: No, I don't.

MR. J. FOSTER: Jim Eichner.

MR. H. FOSTER: I've probably heard the name, but -- I mean, you know, if somebody can come in now and do it, that -- that would be a miracle. But the chances of that happening -- I wouldn't hold my breath.

I'd be very proud if, in fact, the investigation is able to turn up something and end up with a credible case. That would be a significant event, in my judgment, and would speak very highly of whoever is running the investigation at this stage, because it's very difficult to pick up an investigation at this stage. Very difficult.

MR. KEMERER: I know you're an insider trading guy, but do you know what a wash trade is?

MR. H. FOSTER: Yeah.

MR. KEMERER: What's that?

MR. H. FOSTER: A wash trade is a trade in which you essentially are engaged in a riskless transaction. You have an account at Merrill Lynch and you buy 1,000 shares of IBM, while at the same time you sell 1,000 shares somewhere else in another account at the same price.

MR. KEMERER: Uh-huh.

MR. H. FOSTER: The net effect is, it's riskless for you. The problem with the trade is several-fold. Both trades get printed. By that, I mean the public sees these two trades and they think that these are legitimate trades at that particular price.

MR. KEMERER: And it shows up on the trade blotter.

MR. H. FOSTER: And it shows up on the trade blotter. Its most egregious form, I guess, would be in a stock manipulation where there's not really much interest, but you set up these accounts that you control in each and you just keep bidding the price up.

MR. J. FOSTER: And artificially create the volume.

MR. H. FOSTER: Right. Right. Exactly.

MR. KEMERER: It's like having a shill at an auction, right?

MR. H. FOSTER: Precisely. Precisely.

MR. KEMERER: And there's no beneficial change in ownership. Is that it?

MR. H. FOSTER: Precisely. Precisely.

MS. MIDDLETON: If I could just pick your brain a little bit more.

MR. H. FOSTER: I'm retired. I've got all day.

MS. MIDDLETON: Okay. But I don't want to waste their time.

But when you say that other countries have the better laws or statutes, we have better enforcement, what is it in the nature of their laws that is better?

MR. H. FOSTER: Well --

MS. MIDDLETON: They don't require this duty thing, or what?

MR. H. FOSTER: It's -- it's -- it's almost as though they have -- yeah. They don't require the duty analysis. It's empiric information on advantage type of thing as opposed to a duty analysis.

MS. MIDDLETON: Okay. Okay.

MR. H. FOSTER: And that's it. But still, the Chicago people and everyone would argue, look, if I'm engaging in illegal insider trading, I go to the New York Stock Exchange and I place an order for 1,000 shares, you know, 20 -- halfway across the country at the same time you decide you want to sell your 20,000 shares, your decision is -- I am not influencing your decision to buy or sell, and so in that sense the fact that you've sold to me and I'm making a lot of money doesn't make you a victim. That's when they're talking about this victimless crime.

But what that misses, is the fact that I am

using someone else's information for personal profit. Okay. And it disturbs the notion that the prices reflect true value.

MR. KEMERER: And actual supply and demand.

MR. H. FOSTER: And actual supply and demand. Yeah.

MS. MIDDLETON: And that's the area of a perfect market or --

MR. H. FOSTER: Yeah. Yeah. Yeah.

MS. MIDDLETON: Yeah.

MR. H. FOSTER: But it's -- I mean, it's -- you know, I'd say it's common sense. You can't have a system which essentially is rigged against the guy who doesn't work for the law firm, or this, that and the other thing. Why would you invest in a market where you knew that there are people running around with that type of unfair informational advantage?

MR. J. FOSTER: So the foreign statutes that you're talking about, they just flat-out make it illegal to trade on material non-public information, period?

MR. H. FOSTER: Yeah. Yeah. Yeah. Yeah.

MS. MIDDLETON: Is that the U.K.?

MR. H. FOSTER: Oh, I used to know.

MS. MIDDLETON: Doesn't matter. I just --

MR. H. FOSTER: Yeah. But -- yeah.

MS. MIDDLETON: Okay.

That wasn't a factor, though, with the situation in GE-Heller trading and Mack and taking his testimony, right, that there was a problem showing --

MR. H. FOSTER: It shouldn't have been.

MS. MIDDLETON: Okay.

MR. H. FOSTER: I mean, people could have held it up, but --

MS. MIDDLETON: Okay. Just wondering.

MR. H. FOSTER: You know, I mean -- but, you know, in fairness to various supervisors, reasonable people can differ as to the timing of when to take testimony. No one in their right mind would have said that Mack's testimony should not be taken.

The better judgment, in my opinion, would be to support your investigator when he comes and says "I'm ready." You know, why beat a guy over the head and say, no, you can't do it? Obviously if there's a more sinister reason, that's illegal and wrong.

But just from a management standpoint, I had a rule. I'll let you do whatever you want to do, as long as it makes some kind of sense. The only requirement is, before you go out and do it, you come talk to me so that I can make sure that you're not sending a subpoena to the bank without complying with the RFPA, or whatever.

And if he sent out some subpoenas that didn't comply with whatever, that would have been a mistake, but it ain't a hanging offense by any stretch of the imagination. That happens a lot.

MS. MIDDLETON: Along those lines with management, letting your investigators do what they want --

MR. H. FOSTER: Not what they want, but encouraging them.

MS. MIDDLETON: Encouraged. Yeah.

MR. H. FOSTER: You've got to know what they're doing, but you don't want to stifle them, is what I'm saying.

MS. MIDDLETON: Right. And along those lines, let me just ask you different questions related to that. If you've got -- if you're managing an investigator and you're getting phone calls from people outside the SEC --

MR. H. FOSTER: Opposing counsel?

MS. MIDDLETON: Opposing counsel. Did you -- did that happen a lot at the SEC, where the investigator wasn't --

MR. H. FOSTER: I -- I -- I think one of the biggest sins -- not sins. One of the biggest problems any investigator has is when the law firm goes -- as we say, goes over your head. And when I was a Branch Chief

and I'd get those calls, I'd say, wait a minute, I'm bringing the investigator in.

The thought that something could be happening on a case unbeknownst to the primary investigator does not speak well for the system. If you don't have enough confidence to tell your investigator what the hell is going on in his case, he shouldn't be investigating that case or you shouldn't be managing them. But you cannot have a situation where -- where that's going on, in my opinion.

MR. KEMERER: Speaking of that, I mean, I think you mentioned Mary Jo White. She's a former U.S. Attorney's Office in New York, right?

MR. H. FOSTER: Yeah.

MR. KEMERER: Now, are you aware, or have you heard, that Ms. White called Linda Thomsen?

MR. H. FOSTER: I've read that in the papers.

MR. KEMERER: Okay.

Did that strike you -- I mean, Linda Thomsen is right up there. She's the Director of Enforcement. Did that strike you as a bit odd?

MR. H. FOSTER: No. Odd? No. I think the question would be, what did Linda Thomsen do? I mean, if I'm Mary Jo -- if you want to quash an investigation, if you want to get some relief from a subpoena, you beat the

investigator over the head, and if you don't win with him you call his boss.

And I've had that happen to me. But at least the people in that scenario would tell you, okay, Hilton, you're as stubborn as can be, but I'm going to call Linda, and I want you to know I'm going to call Linda.

MR. KEMERER: Uh-huh.

MR. H. FOSTER: That's, in my judgment, the professional way to go. At that point I'd go in and I'd see Linda, or whoever it was, and say, look, you're going to be getting a call from Mary Jo White, and this is what she's complaining about, here's the subpoena, and this is why it makes sense, and I'd like to sit in on the call.

MR. KEMERER: Would it strike you as odd if Linda didn't sort of bring Mr. Aguirre in on that conversation?

MR. H. FOSTER: It wouldn't strike me as odd. It would -- it would be a different approach than what I would take. And she's the Division Director. I'm not. But that's -- you know.

MR. KEMERER: Right.

MR. H. FOSTER: Maybe there's a reason. I don't know. But, no. That's my answer. Yeah.

MR. J. FOSTER: You said earlier that you thought that the decision about exactly when to take

Mack's testimony was something that reasonable people could differ on.

MR. H. FOSTER: Yeah.

MR. J. FOSTER: That you could take the position about whether to do it now or whether to do it later --

MR. H. FOSTER: Right.

MR. J. FOSTER: -- and either one is reasonable.

MR. H. FOSTER: No. Well, I would -- my -- my approach, generally speaking, is to take testimony sooner rather than later. Generally speaking.

MR. J. FOSTER: Right.

But if someone said it was unreasonable to want to take his testimony in the summer of '05, what's your reaction to that?

MR. H. FOSTER: I would say, no, that's not unreasonable. It's alternative A. There might be -- A, B and C might be the three alternatives. To say A is unreasonable is not correct, in my judgment. To say that B or C are preferable, whatever. But unreasonable? No.

MR. KEMERER: And we already talked about the absence of a real down side in taking his testimony, right?

MR. H. FOSTER: Right. Right. And, you know,

part of -- part of investigating -- well, this is a course I haven't taught yet. But if I were to teach a course, it would be investigative strategy. You take the testimony sometimes to let people know that you're poking around, that you're getting close.

One of the things you do as an investigator is -- like that case I was telling you about where we called up the woman, and whatnot, is you record the time that you had that phone call, then you send out a subpoena and you get the phone records to see who she called next. And who did she call next? She called the boyfriend. So, I was on to him before she came in. But the point being, for strategic reasons you can do things like that.

MR. J. FOSTER: Sure. I think the FBI calls something similar to that "tickling the wire".

MR. H. FOSTER: Yeah. Yeah.

MR. J. FOSTER: Right.

MR. H. FOSTER: But for my own edification, this is an investigation of what, of whether or not he was properly discharged and whether or not -- a whistle-blower allegation?

MS. MIDDLETON: Generally speaking. It's pretty much everything he's raised about his termination and --

MR. H. FOSTER: And the reason for --

MS. MIDDLETON: -- whether it's related to the investigation.

MR. H. FOSTER: Whether there was political pressure.

MR. J. FOSTER: The sufficiency of the IG's review of this allegation.

MS. MIDDLETON: Yeah. There was that, too.

MR. J. FOSTER: There's lots of issues.

MS. MIDDLETON: So, yeah. It's --

MR. H. FOSTER: Well, they --

MR. J. FOSTER: We don't operate with sort of formal Orders of Investigation --

MR. H. FOSTER: Okay. Right.

MR. J. FOSTER: -- you know, the way the Commission does.

MR. H. FOSTER: Okay. Right. That's what I was asking.

MR. J. FOSTER: So it's not necessarily defined.

MS. MIDDLETON: Yeah.

MR. H. FOSTER: Okay.

MS. MIDDLETON: And we'll just see what issues arise from this.

MR. H. FOSTER: Well, they got around to talking to me a couple of weeks -- about a month ago. So

--

MR. KEMERER: The Inspector General?

MR. J. FOSTER: The Inspector General?

MR. H. FOSTER: Yeah.

MR. J. FOSTER: They had not talked to you before that?

MR. H. FOSTER: Not that I recall.

MR. J. FOSTER: So, I'm sorry. When? A couple of months ago?

MR. H. FOSTER: Sometime this summer. Yeah.

MR. J. FOSTER: This summer?

MR. H. FOSTER: Yeah.

MR. J. FOSTER: Summer of '06?

MR. H. FOSTER: Yeah.

MR. KEMERER: What types of things did they ask you?

MR. H. FOSTER: The same stuff.

MR. KEMERER: Just basically what we're asking you?

MR. H. FOSTER: Yeah. Basically, yeah. Would reasonable people differ? Did anyone tell you the fix was in? You know, that kind of stuff.

MS. MIDDLETON: How --

MR. H. FOSTER: What did you think of his work?

MS. MIDDLETON: And you told them essentially

what you've told us today?

MR. H. FOSTER: Yeah. Yeah.

MS. MIDDLETON: How long did they spend with you?

MR. H. FOSTER: About an hour, hour and a half.

MS. MIDDLETON: An hour.

Was it by phone, or --

MR. H. FOSTER: No. I went down there and I met two people. One was Adrian somebody, I think, and I don't remember -- two women. I don't remember the others.

MR. KEMERER: Mary Beth Sullivan?

MR. H. FOSTER: That sounds --

MR. J. FOSTER: Kelly Andrews?

MR. H. FOSTER: Mary Beth Sullivan sounds familiar, but I'm not sure. I just remember the name because that was my sister's name. But maybe that was from something else. I don't know.

MR. J. FOSTER: And did you know that last fall, when they did their first -- when the SEC IG did its first investigation, did you know that they were doing an investigation at the time?

MR. H. FOSTER: No.

MR. J. FOSTER: How did you --

MR. H. FOSTER: I recall learning from Gary

that he'd been fired, and I thought that was the craziest thing I'd ever heard. And I went out to lunch with him over here at the Monocle. And we had lunch and we talked about -- you know, he was asking -- he was asking me essentially, what would I say if I was working that kind of stuff. I told him, I said, you're great.

I told him that I'd made this comment about playing in the sandbox, but still he's a great investigator. I met with him down at -- on the waterfront, H_2O. I had lunch with him down there, I guess, the springtime, when he was basically saying that you guys -- people were asking questions and, you know, could he refer you guys to me. I said, yeah.

MR. J. FOSTER: So, you think it's in these conversations with him that you learned that the IG had closed an investigation last fall without talking to you, or --

MR. H. FOSTER: No. I think -- I think I read in the paper that they had had an investigation or something. I don't know. I'm not sure he told me that they closed -- I'm not sure if it closed at that time.

I don't -- I'm not sure I discussed with him the IG thing, but all this was in the paper by then so I'd read stuff in the paper. Some woman from the *New York Times* called me up. Then another woman from

somewhere else took me out to lunch. [Laughter].

MR. J. FOSTER: You're in demand.

MS. MIDDLETON: Yeah.

MR. H. FOSTER: What I'm trying to do now is get back on my speaking gig, because I do this insider trading training. They did call me up. Our Office of International Affairs called me up and asked me if I would teach again at the fall training program this November. So --

MR. KEMERER: When did they call?

MR. H. FOSTER: I think Scott Birdwell sent me a memo or something a couple, three weeks ago, whatever. But I've been speaking there for the last 15 years. I did it last year after I was gone, and whatnot.

MR. KEMERER: Okay.

MR. H. FOSTER: So you're putting the program together. You know, who do the people like? They like Foster. Let's call him up, and will he do it, you know.

MR. J. FOSTER: Did you see the letter that Gary Aguirre sent to Chairman Cox?

MR. H. FOSTER: Only if it was on the Internet. I wouldn't have seen it from him. If you show it to me I can tell you whether I think I've seen it or not.

(Whereupon, the document referred to as Exhibit No. 30 was marked for

identification.)

MR. J. FOSTER: This is the letter from Gary Aguirre to Chairman Cox --

MR. H. FOSTER: Yes. I think --

MR. J. FOSTER: -- on September 2, 2004.

MR. H. FOSTER: I think I did see this at some point.

MR. J. FOSTER: Your name is mentioned in there.

MR. H. FOSTER: Yeah. That's why I remember --

MR. J. FOSTER: The second paragraph.

MR. H. FOSTER: I remember seeing something that had my name on it. Yeah. Yeah.

MR. J. FOSTER: He represents, in that paragraph -- he says what he, you, Eric Ribelin, and Thomas Conroy all believed, that "PCM engages in an institutional form of insider trading that corrupts the financial markets and creates an unlevel playing field for honest investors." Is that an accurate characterization?

MR. H. FOSTER: Well, my problem is, I don't like disparaging a firm that's been around for a long time like Pequot Capital Management. But as investigator do talk to one another, the question arises, what do you think?

Again, stressing it's my personal opinion, not that I had enough evidence at the time or today to go to court with it, but are there reasons for me to believe that they're engaged in insider trading? Yes. Did I believe it in my heart? Yes. Did I have the proof? Not as much as I'd like.

MR. J. FOSTER: So my understanding is that the Inspector General's investigation last fall was started because of this letter.

MR. H. FOSTER: I don't -- I don't know.

MR. J. FOSTER: Okay. So you said they didn't talk to you.

I guess you have no idea whether they talked to Eric Ribelin or Thomas Conroy?

MR. H. FOSTER: Correct

MR. J. FOSTER: Okay.

MR. H. FOSTER: But they did talk to this earlier -- you know, a couple of months ago.

MR. J. FOSTER: Right.

MR. H. FOSTER: Right.

MR. J. FOSTER: In the summer of '06.

MR. H. FOSTER: Yes.

MR. J. FOSTER: Right.

Do you have anything else?

MS. MIDDLETON: No. Although I want to pick

his brains some more off the record.

MR. J. FOSTER: Okay.

MR. KEMERER: Just about securities laws?

MS. MIDDLETON: Yeah.

MR. KEMERER: Oh. Okay. That's great.

MR. J. FOSTER: Yes. I don't think I have any other questions on the record.

MR. KEMERER: I think we're done as well.

MR. J. FOSTER: Thank you very much for coming in. We appreciate your time.

MR. H. FOSTER: Oh, no problem. Glad to help.

[Whereupon, at 3:21 p.m. the interview was concluded.]

C E R T I F I C A T E

This is to certify that the foregoing proceedings of an interview before the U.S. Senate Finance Committee and U.S. Judiciary Committee Commerce, in the matter of Trading in Certain Securities, No. HO-9818, and the SEC's Termination of Employment of Gary Aguirre, held on Friday, September 15, 2006, were transcribed as herein appears, and this is the original of transcript thereof.

LISA DENNIS
Official Court Reporter

From: Kreitman, Mark J.
Sent: Tuesday, February 22, 2005 3:23 PM
To: Foster, Hilton
Cc: Aguirre, Gary J.; Ribelin, Eric; Hanson, Robert
Subject: RE: Pequot--Prem Lochman

Thanks, Hilton.
That helps.
If we can interest the Southern District again, that should be a very high priority.
Mark

-----Original Message-----
From: Foster, Hilton
Sent: Tuesday, February 22, 2005 3:21 PM
To: Kreitman, Mark J.
Cc: Aguirre, Gary J.; Ribelin, Eric
Subject: RE: Pequot--Prem Lochman

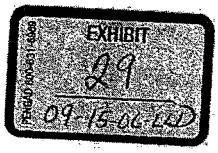
Gary is basically saying that it probably won't be very productive to talk to Lachman at this time since Lachman is aware of the authorities' interest in his possible involvement in illegal trading or tipping.

I think Gary agrees with me that a good way to 'squeeze' or put pressure on Lachman is to get some important evidence on him from a review of his phone records or thru other means.

As I understand it, SDNY put the inquiry on hold because the SDNY did not have any securities trading to look at. If we can work backwards from Pequot's trading and connect it, directly or indirectly to Lachman, then we might have something to run with.

When Gary says that Lachman's credibility is zero, Gary is not saying that he believes that Lachman did not pass the tip or rumour. He is saying that Lachman backed off his story because Lachman thought that his purported tippee talked to the authorities and was thereafter wearing a wire.

Hilton



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F ST., N.E.
WASHINGTON, D.C. 20549

(202) 551-4437

September 2, 2005

Via Facsimile to 202-772-9200 and Regular Mail

Chairman Christopher Cox
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20037

Re: In the Matter of Trading in Certain Securities; HO-9818

Dear Chairman Cox:

I am compelled to write to you today, my last day with the Commission, out of a sense of duty to the Commission's mission—to maintain the integrity of the financial markets and to protect the investor. Unfortunately, my supervisors—as far up the chain as I can see—have lost sight of that mission in the above matter. I state the facts briefly below, though there is much more to be said.

I have been the staff attorney in the above matter from mid-September 2004 through today. It is an investigation of suspected insider trading by one of the largest hedge funds in the nation, Pequot Capital Management ("PCM"), arising out of eighteen SRO referrals. Staff who worked on this matter from the beginning—Hilton Foster, Eric Ribelin, Thomas Conroy, and I—believe that PCM engages in an institutionalized form of insider trading that corrupts the financial markets and creates an un-level playing filed for honest investors.

As the investigation progressed, one matter dwarfed all others, suspected insider trading by PCM's CEO, Arthur Samberg, during July 2001, just before the General Electric Company ("GE") acquired Heller Financial, Inc. ("Heller"). Mr. Samberg bought $44 million in Heller stock and shorted $36 million in GE stock shortly before the public announcement of the acquisition on July 30, 2001, making an $18 million profit. On the two occasions I took Mr. Samberg's testimony, he could offer no credible explanation for these trades. Everyone involved in this investigation has informed me of their belief Mr. Samberg obtained material non-public information prior to these trades. The only question is: from whom?

Only one person meets the tipper's profile: John Mack, the current CEO of Morgan Stanley. I began informing my supervisors of this evidence in early June. Later in the month, I suggested that Mr. Mack's testimony be taken. On approximately June 23, my Branch Chief, Robert Hanson, told me that it would be very difficult to obtain approval to take Mr. Mack's testimony because of his powerful political connections. Mr. Hanson later repeated the same

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statements to me on several other occasions. Some are confirmed by e-mails. Assistant Director Kreitman participated in one of these discussions.

Other events also suggest the decision to take Mr. Mack's testimony has not been handled in the normal course. For example, I have issued approximately 100 subpoenas in this matter and all responsive documents came directly to me. When I served a subpoena on Morgan Stanley seeking documents relating to contacts between Messrs Mack and Samberg, its counsel did not initially send them to me. Rather, she first sent them to Linda Thomsen. Likewise, Morgan Stanley's counsel, Mary Jo White, bypassed the normal protocol of dealing with the staff attorney. Instead, she dealt directly with Ms. Thomsen by correspondence and phone. Of hundreds of contacts with defense counsel, this is the first time any defense counsel began discussions at the top of the chain of command. Further, at the same time, my supervisors excluded me from the discussions involving Mr. Mack.

To avoid any misunderstanding, from late June through late August, I sent multiple e-mails to my Branch Chief Robert Hanson, Assistant Director Mark Kreitman, and Associate Director Paul Berger, as well as a brief e-mail to Linda Thomsen, expressing my concerns. I had no success in obtaining their approval to take Mr. Mack's testimony. Instead, they fired me. Immediately prior to the Mack controversy arising, my Branch Chief and Assistant Director congratulated me for the excellent job I was doing in this investigation. Indeed, Mr. Kreitman gave what he called his highest "Perry Mason award" in mid-June.

I bring these facts to your attention in hopes that you will take whatever steps are appropriate to put this investigation back on track, consistent with the Commission's mission.

I must add that other improper motives also led to my termination, but there is no productive reason to discuss them here.

Sincerely,

Gary I. Aguirre
Senior Counsel

CC: Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth
(By fax and Regular Mail)

UNITED STATES SENATE

COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

In the Matter of:	
TRADING IN CERTAIN SECURITIES, and the SEC's TERMINATION OF EMPLOYMENT OF GARY AGUIRRE GARY AGUIRRE	No. HO-9818

September 1, 2006

The interview of ERIC J. RIBELIN, Branch Chief, Office of Market Surveillance, Enforcement Division, SEC, was convened, pursuant to notice, at 2:37 p.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance

HAROLD H. KIM, Esq.
Chief Civil Counsel
U.S. Senate Committee on the Judiciary

HANNIBAL G. WILLIAMS II KEMERER, Esq.
Counsel
U.S. Senate Committee on the Judiciary

MR. NATHAN MORRIS
Professional Staff Member
U.S. Senate Committee on the Judiciary

MS. EMILIA DiSANTO
U.S. Committee on Finance

MS. STEPHANIE MIDDLETON
U.S. Committee on the Judiciary

MS. JANE COBB
Director
Office of Legal Affairs

ANIL ABRAHAM, Esq.
Counsel to the SEC Chairman

MR. ERIC J. RIBELIN
Branch Chief
Office of Market Surveillance
Enforcement Division
U.S. Securities and Exchange Commission

P R O C E E D I N G S

MR. KIM: Mr. Ribelin, we've already done our informal introductions, but for the record, let's start the introductions. My name is Harold Kim. I'm with Senator Spector on the Judiciary Committee.

MS. MIDDLETON: Stephanie Middleton, Senator Specter, on the Judiciary Committee.

MR. KEMERER: Hannibal Kemerer, Senator Spector, on the Judiciary Committee.

MR. FOSTER: Jason Foster, with Senator Grassley, Finance Committee.

MR. PODSIADLY: Nick Podsiadly, with Senator Grassley, Finance Committee.

MS. DiSANTO: Emilia DiSANTO, with the Finance Committee.

MR. KIM: Before we start, I'd like to thank you for appearing. Oh.

MR. ABRAHAM: Sorry. Anil Abraham. I'm counsel for the SEC Chairman.

MS. COBB: And Jane Cobb, Legislative Affairs in the SEC.

MR. KIM: And Mr. Ribelin, if you could just introduce yourself to everyone for the record.

MR. RIBELIN: Yes. My name is Eric Ribelin. I'm a branch chief in Division of Enforcement of the SEC.

MR. KIM: Again, on behalf of the Judiciary Committee, we thank you for appearing.

We're going to turn this over to our colleagues on the Finance Committee. Mr. Podsiadly will be doing most of the questioning, but the way we've been doing it this afternoon and this morning has been, everyone is just kind of jumping in and asking questions where they see fit to fill the gaps.

But with that said, I will turn it over to Mr. Podsiadly.

MR. RIBELIN: Can I just say one thing before we start? This morning I was delivered a letter dated August 31 from the Secretary of the Commission, Nancy Morris, that lays out certain things that I can go into and certain things that suggest that, at least in terms of longstanding Commission policy, that I can't go into.

So I guess if we get into -- you know, if we start to touch those areas, then we can figure it out when we get there.

MR. KIM: Okay. When did you get that letter?

MR. RIBELIN: This morning.

MR. KIM: How?

MR. RIBELIN: It was delivered by, I believe, an administrative assistant from the General Counsel's Office.

MR. KIM: From the General Counsel's Office?

MR. RIBELIN: Right. And again, the letter is dated August 31st.

MR. KIM: And this was delivered to your home or your office at the SEC building?

MR. KIM: To my office at the SEC.

MR. FOSTER: Did you have an occasion to consult any private counsel for advice regarding the letter?

MR. RIBELIN: No.

MR. PODSIADLY: Well, I think we'll get started here. The first thing I want to let you know, even though everything's being transcribed, it's not a formal deposition. We'll do it real informal. I'll probably lead, but everybody else will jump in.

Please feel free -- you don't have to respond just directly. You can narrate and provide narrative background. However you want to answer is fine.

You will get an opportunity to read the transcript. You can't make substantive changes, but you can make changes if you said the wrong word, or something like that.

But you're not going to be sworn either, but you do have an obligation under 18 U.S.C. 1001 for statements you make to us.

More importantly, you have the right to speak freely with us today. You know that you may not go out to General Counsel, but you do have the right to speak, particularly alone, to Congress.

So if you would like to exercise your right under 18 U.S.C. 7211, you can ask the representatives from the SEC to leave today and we'll honor that request and ask them to leave as well. So if you want to exercise that right, just let us know.

MR. RIBELIN: Okay.

MR. PODSIADLY: You can do it now, you can do it whenever, whatever you want to do in the beginning.

MR. RIBELIN: Okay. I mean, I think we're fine for now. Can I just say one additional thing concerning the letter?

MR. PODSIADLY: Sure.

MR. RIBELIN: The final paragraph states, "We are assigning counsel from the Office of the General Counsel to be available to attend the Senate staff interviews with you."

MR. PODSIADLY: Okay.

MR. RIBELIN: "If any question arises as to the scope of the Commission's authorization to you or the conduct of the interviews, you should seek advice and direction from the counsel."

I take it that there's no one here from the General Counsel's Office. I will say that I did speak a few weeks ago with Sam Forstein from the General Counsel's Office, and he did offer to accompany me if I wished, and I did not get back in touch with him to ask him to accompany me. So, I presume that's the reason nobody from General Counsel is here.

MR. PODSIADLY: Okay. Well we'll do the best to honor avoiding what you can and can't speak to. We can make a decision -- based on -- the record, and then we'll go back for more authorization.

MR. FOSTER: Well, and you should be aware also that our position is that that letter does not limit what you can say to us. You have the right to speak to Congress, regardless of whether the Commission's authorized you to speak to us about particular things, things that are purported to limit the scope in that letter. Our position is that those aren't binding on you. You have a right to speak to us about them.

MR. RIBELIN: I understand.

MR. PODSIADLY: So if you need a break at any point, just let us know. But again, thanks for coming.

Mr. Ribelin, can you give us your current title and position with the SEC?

MR. RIBELIN: I'm a Branch Chief in the Office

of Market Surveillance, Division of Enforcement, U.S. Securities and Exchange Commission, and have been for four years.

MR. PODSIADLY: Okay.

Can you kind of give us a background narrative of your career with the SEC and how long you've been there, positions held, kind of a verbal CV?

MR. RIBELIN: I joined the SEC in 1988. I'm not a lawyer. I joined the Office of Market Surveillance, which is the office within the Division that acts primarily as the liaison between the national stock markets and the Enforcement Division in terms of getting referrals on insider trading and stock manipulation. That's one of four main areas.

For a number of years, I was a senior -- a Market Surveillance Specialist. I then became a Senior Market Surveillance Specialist, which did not have supervisory responsibility. Then finally in, I believe it was 2002, became a Branch Chief, and I supervise five people.

MR. PODSIADLY: And what kind of cases do you work on, generally, in the market surveillance area? Insider trading?

MR. RIBELIN: In terms of the assistance that we in Surveillance give to the investigative staff at the

SEC, the lawyers in the Enforcement Division, our assistance is usually in the area of stock manipulation and insider trading.

And though our primary responsibility is to act as liaison with the stock markets, we are asked from time to time to assist the attorneys in the Division with their investigations of insider trading and stock manipulation.

MR. PODSIADLY: What kind of assistance do you provide?

MR. RIBELIN: Technical assistance in terms of helping to analyze trading patterns, as an example, helping to decipher activities of stock brokers and traders, and assistance when it comes to certain things as analyzing trading positions or derivative securities.

We assist in analyzing the documentary information we get in in investigative proceedings from potential witnesses, and also assist in the interrogation of those individuals in the investigative proceedings.

MR. PODSIADLY: So you basically get a lot of referrals from the SROs, and then sort of -- you sort of data mine that information, or is it presented to you in a fashion that has already been drilled down?

MR. RIBELIN: The SROs are -- that's short for Self-Regulatory Organization, so really the stock markets

and options exchanges. The way the kind of surveillance and regulation over the markets has evolved over time, is that the first line is rested with the stock markets to oversee their members and try to determine, you know, to what extent there might be insider trading and/or stock manipulation going on in certain securities.

They have a responsibility of surveilling for that, and then doing some bit of investigative work to try to figure out whether or not a particular case is worth referring to us.

And so once they go through that process, we do have a system whereby they refer electronically to us, to the Office of Market Surveillance, potential insider trading and stock manipulation cases.

Myself, my supervisor, and the other Branch Chief in the Division, in the office, review those referrals and then we make recommendations to the Associate Directors in the Division as to whether or not cases should be pursued or not pursued. It's kind of a collaborative effort in determining what to do.

MR. PODSIADLY: One thing before I forget. I was just informed. I forgot to tell you one other thing on the opening I had actually jumped over, is I want to make sure that you know that, in requesting the right of SEC employees to leave the room while you talk to

Congress, you have a right not to be retaliated against as well, and we will work to make sure that you're not retaliated against, if you choose that option.

MR. RIBELIN: I appreciate that.

MR. PODSIADLY: I want to make sure you have that, and we have that on the record for you.

MR. RIBELIN: Thank you.

MR. PODSIADLY: So diving back in, I guess, we'll jump to, when did you first hear of Pequot Capital Management? Have you ever heard of this?

MR. RIBELIN: I have. In the process of receiving referrals from the exchanges, it's one of -- it's one entity. It's a hedge fund that we had seen multiple times coming in insider trading referrals.

I think currently we have somewhere in excess of 20 separate referrals over the last five or six years in which Pequot is indicated as trading ahead of material, non-public announcement, that caused the stock price to move.

It was in 2003, I believe, that I saw another referral--and I can't remember what it was, but another referral--in which they were -- we have a system whereby we can look and see if an entity has been looked at previously by the Division. And, in fact, their name had come up before, and I had heard their name before and

spoke to other people who'd heard their name. And so that's the first time.

MR. PODSIADLY: Okay. And so when did you actually first -- once you received the referrals, were you ever asked to join in an investigation into Pequot or to provide assistance on that?

MR. RIBELIN: I -- at the point that it became apparent that they had been referred multiple times, I suggested that, you know -- that, you know, we have multiple red flags, that maybe something was to be done.

And ultimately I spoke to Richard Grime, who is an Assistant Director in the Enforcement Division, and his Branch Chief, Charles Kane, and I said that, you know, this is something that's maybe worth looking at.

At the time, I think I presented them with three or four or so referrals that I had gathered. They looked at it. They agreed that a MUII, which stands for Matter Under Investigation or Inquiry, should be opened and they went ahead and did that.

MR. PODSIADLY: So the first involvement was that.

And what was your next involvement with Pequot following that?

MR. RIBELIN: The MUII was opened and there was a staff person who worked on the case for a period of

time. I believe his name was Robert Condrat, and he was with the Commission for only a few more months after getting the case. And I think it was in late -- late in 2003 that he prepared a memo suggesting what needed to be done with the case and what had already been done with the case.

It wasn't until, I would say, late in 2004 that I started to have any -- any involvement with it. And day-to-day involvement, or weekly involvement, really wasn't until about January of 2005. This is after Gary Aguirre was hired.

MR. PODSIADLY: Okay. And he took over the investigation?

MR. RIBELIN: He took over the investigation. I think that there was someone in the interim between Condrat and Aguirre who may have worked on it very briefly. That person, I think, has been detailed to the U.S. Attorney's Office in New Jersey.

MR. PODSIADLY: So from that 2003 to 2005 period, the case was sort of open, but inactive. Would that be a good characterization?

MR. RIBELIN: I think when Condrat was working on it he was -- he had taken steps, certainly, to try to move the case forward, so I wouldn't say it was inactive at that point. After he left and until Aguirre came on

board, my impression is that it was inactive.

MR. PODSIADLY: So once Aguirre came on board in 2005, it sort of ramped up again?

MR. RIBELIN: Right. That's right.

MR. PODSIADLY: And did he approach you about the case once he came on board, Mr. Aguirre?

MR. PODSIADLY: He -- when he was first assigned the case, or at some point thereafter, he was spending a fair bit of time talking to one of the guys in Market Surveillance to get information concerning analysts' reports. I think the name of the service is First Call. And Market Surveillance had access to this First Call system.

MR. PODSIADLY: Uh-huh.

MR. RIBELIN: And so he was coming down on a fairly regular basis, trying to get this information, because we held the key to getting First Call information. It was at that point that I met him for the first time.

And it was soon after that -- he was asking the guy who reported to me to help him get that information, and it was soon after that we spoke and I offered to assist him on the case if he needed it.

MR. PODSIADLY: Okay.

And what's First Call, just for clarification?

MR. RIBELIN: It's a system whereby one can get stock market analysts' reports on individual companies. And I think he was gathering -- I'm not sure of this, but I think he was gathering the reports on the companies that had been referred into the SRO referral process.

MR. PODSIADLY: Okay.

And so once you sort of volunteered your services to Mr. Aguirre, what kind of happened next? Did he formally ask you on board, or were you assigned by your boss to work on the matter, or --

MR. RIBELIN: There was never really kind of a formal process whereby I was assigned. I had certain-- and I do have certain--leeway to work on cases, and I offered to do that. And I'm sure at some point I told my boss that I was going to assist, you know, to the extent that I could.

I should say that at the time -- back at the time that Mr. Condrat was working on the case, someone who reported to me, Steven Glascow, was assisting Mr. Condrat and getting some information together on some of the referrals. So I had, earlier on, some supervisory responsibility over a person who was working on the case before Aguirre came on board.

MR. PODSIADLY: So Mr. Glascow is one of your subordinates?

MR. RIBELIN: He is.

MR. PODSIADLY: Okay.

And at that point you were now involved in the case. So what was the next major point that sort of happened? Were you approached to do one certain thing or the other, or was it sort of this ongoing kind of, just providing consultation here and there?

MR. RIBELIN: It was -- I'm trying to think how to characterize it. I guess it changed a bit over time. I mean, it was clear that the case that had been kind of a formal inquiry was moving forward to a formal investigation.

It was some time, I believe, in late 2004, in December, that Gary, along with Charles, and Richard, and Paul Berger, who was Associate Director, went to the Commission to get a so-called Formal Order of Investigation, which would then give us subpoena power to get documents and to compel testimony.

And I, along with a number of others, were added as officers of the Commission to be able to assist in the investigation and to be involved in whatever investigation testimony was taken.

And so the case was moving forward. It was ramped up based on the fact that we had gotten a formal order, and very quickly then subpoenas were issued by

Gary for document production, primarily e-mails, but other information, that Pequot had.

Previously they had supplied some information to us on a voluntary basis. I don't think they had supplied e-mails, but Gary thought it was important to get those e-mails.

And so I would say in January, things became very active and I was involved in a fairly regular basis in discussions about what we needed to get from Pequot. And as that information began to come in, I was involved with looking at the information, talking to my people who were also, at that point, primarily Steve Glascow, but then Tom Conroy came on board and assisted in looking at account statements and trying to analyze the trading. And so it was in the January period that it was very active.

MR. PODSIADLY: How much time did you spend personally on the case from January -- how much of -- what percentage of your personal time did you spend on the case, starting in January? And give us a sense how that changed over time through the rest of 2005.

MR. RIBELIN: I would say, 30 percent. Twenty-five, 30 percent of my time for much of 2005, I would say, up through July/August time period. There were some weeks it was higher than that, other weeks, lower than

that. And that was involved with both supervision of a couple of people who reported to me who were working on it, and also talking with Gary. So, I would say that's a rough estimate.

MS. MIDDLETON: How about after August?

MR. RIBELIN: After August, my involvement dropped off significantly in terms of my day-to-day involvement. There continued -- Tom and another guy, Craig Miller, continued to focus on one aspect of the case, which was the possibility that there was stock manipulation going on, that we had noticed, trading that pointed to that.

And then Steven Glascow continued to work on the insider trading aspect of it, and from time to time would meet with Jim Eichner, who is a person who was assigned, really, to take over for Gary. In terms of my personal involvement, very little after August.

I was involved in the preparation of a memo, along with Tom and Steve, in late '05 concerning the concerns we had about manipulative trading, and for a few weeks I spent a good bit of time working on that.

MS. MIDDLETON: Why did your time drop off after August?

MR. RIBELIN: I'm sorry. Say it again.

MS. MIDDLETON: Why did your time drop off

after August?

MR. RIBELIN: There was a point that -- there was a point that I -- after Gary was fired, that I was -- I really didn't want to -- I wasn't sure what was going on with the investigation and I had been frustrated with certain decisions made, and I had encountered, back in January and February, some resistance to, shall we say, aggressively pursuing certain things.

And that was a period of great frustration to me. That was overcome as certain things were discovered, primarily by Gary. And then after he was fired, I was frustrated. I wasn't sure what the firing was about. And, frankly, I wanted to remove myself from working on it day-to-day.

I was told by my supervisor, who's a friend, Joe Cella, that not working on the case was not an option. And I said, "That's fine. Of course, I'll continue to work on it."

But in terms of my day-to-day involvement, that did slack off. And I thought maybe it best to just allow the guys who had been working on the case who reported to me to continue to do what they were doing, and they did continue to do that. Sorry. That -- that's kind of -- that's about the best answer I can give. I was -- I was -- I was frustrated.

MR. KIM: Can you elaborate on your frustrations that you just talked about?

MR. RIBELIN: I think Gary Aguirre is one of the smartest, most tenacious, intelligent, thoughtful lawyers that I had worked with in 18 years, and I thought he was aggressively, but appropriately, pursuing an investigation that was moving forward.

I talked about the feeling that we were being discouraged or blocked, or whatever -- however you might want to characterize it, back in January and February. And it took some to work through that road block. And then when he was fired on vacation when he was in San Diego, I -- I wasn't there when it happened.

To this day, I don't know what happened, what was behind it. But when I combined the two, what we'd encountered earlier and then this firing, I was simply -- I lost my, kind of, will to commit time.

MR. KIM: Who are some of the people who were responsible for erecting this road block as part of your and Gary's investigative efforts on the Pequot matter? Can you identify some of those, please?

MR. RIBELIN: Going back to January and February, which is when it was first encountered, there was a very strong sense that was given to us by Paul Berger, and to a certain extent by Mark Kreitman, that we

needed to -- I'm putting it in my own words, and this is my own impression, that we needed to hurry up and figure out whether or not there was a case. We needed to move quickly.

Now, bear in mind, at this point we have somewhere in the neighborhood of 15 referrals where they've been indicated as trading out of material, non-public information. There seemed to be a rush to hurry up and figure out whether or not there was a potential case, and if not, then let's move on. And so they sought to whittle down dramatically the number of stocks that we look at, down to two or three, I think.

And there was a feeling that -- the impression that I had, from Berger, especially -- he seemed dismissive of investigative ideas. He seemed disinterested in the idea of moving aggressively and assertively.

I think some of that was communicated to us by Kreitman, although there was certainly a period that Kreitman seemed to be on board and aggressive and wanting to move forward. So, those two, primarily.

MR. KIM: How about Linda Thomsen? Was she in any way involved in erecting a road block?

MR. RIBELIN: Referring that to the January and February period, so far as I know, she didn't even know

the case was under -- she may have been able to look at a report to see that there was a case called HO-9818, but she was not involved.

MS. MIDDLETON: Are you aware of a meeting, a discussion between Steven Cutler and Audrey from Fried Frank around January or February of '05?

MR. RIBELIN: There was -- Audrey Strauss wanted to meet with us, for lack of a better term, the team that was looking into this matter. And that meeting included myself and Gary Aguirre, and Hilton Foster. There may have been a few other people.

And then there were a number of lawyers from Fried Frank who were there. I think on that day, she indicated that -- I think she indicated, can we have the meeting on this day because I'm going to be meeting with the Director, who at the time was Steve Cutler. So I'm -- I think there was a meeting between those two on the same day that she and other folk from Fried Frank met with us.

MS. MIDDLETON: A separate meeting?

MR. RIBELIN: A separate meeting.

MS. MIDDLETON: That you did not attend.

MR. RIBELIN: I did not attend.

MS. MIDDLETON: And was this narrowing that you talked about, a whittling down of the case, did it occur

after that meeting or before that meeting?

MR. RIBELIN: After that meeting.

MS. MIDDLETON: Right after that meeting, or shortly after that meeting?

MR. RIBELIN: I would say, you know, within the following few weeks or a month or so.

MR. KIM: Do you know if there are any documents written by Paul Berger or Mark Kreitman that embodies this sense of urgency that you describe in your testimony?

MR. RIBELIN: I don't. I don't know of any.

MR. KIM: Then what happened after January and February of 2005? Were there other instances of so-called "road blocks" that impeded the investigation of the Pequot matter?

MR. RIBELIN: We began moving forward, getting e-mails, to begin to take investigative testimony. The next -- the answer is yes. There was a period that there was a continual battle royale between us and Fried Frank in getting them to produce e-mails, Pequot e-mails.

This went on for weeks and months. And we finally started to get a flow of e-mails in, which was -- you know, was welcomed because we worked hard to try to get that production.

Gary was -- spent a great deal of time

determining -- first of all, going through e-mails and determining what we had of the entire universe of e-mails that were ultimately available, and part of that universe of e-mails that conceivably would be available to us at some point was being held back.

And he -- and part of it, I think, was based on claims of privilege, and maybe there were other reasons. But at any rate, there were a group of e-mails that he tried desperately to get and at a certain point, someone was brought on to the matter.

First, my impression was that the individual was retained by Fried Frank to oversee their procedures for collecting e-mail and then producing it to the staff. That person is Larry Storch. And my impression is, he had those e-mails, and Gary tried to get those e-mails and was unable to.

So -- and I don't have a great, you know, kind of exact recollection of what precisely the e-mails were and what all the issues were as to why he couldn't get access to them, but that was a period of great frustration, not being able to get those e-mails. He thought that there may be things in those e-mails that would be helpful to advance the investigation.

MR. KIM: That wasn't necessarily a road block from within the investigative community. That was mostly

from Fried Frank.

MR. RIBELIN: That's right. That's right. That's exactly right. Although I think that there was a period that he was told that he couldn't contact Larry Storch.

MR. PODSIADLY: "He" being Gary?

MR. RIBELIN: Gary. Yeah. Right.

MR. KIM: And who told Gary that he couldn't contact Fried Frank?

MR. RIBELIN: I believe it was Mark Kreitman.

MR. KEMERER: Did you know Larry Storch before?

MR. RIBELIN: No.

MR. KEMERER: Do you have reason to believe that Mr. Kreitman knows Larry Storch?

MR. RIBELIN: My understanding is that they're friends.

MR. KIM: Why do you think Gary was told to get the documents?

MR. RIBELIN: I don't know.

MS. DiSANTO: In your mind, was that unusual for the lead attorney on a case to be advised that he could not contact the attorneys who had the e-mails that he wanted?

MR. RIBELIN: Yes.

MS. DiSANTO: And how many years' experience

did you have at the SEC?

MR. RIBELIN: Eighteen.

MS. DiSANTO: Had you seen this before?

MR. RIBELIN: No.

MR. FOSTER: Why was he told not to contact him?

MR. RIBELIN: I don't know.

MR. KIM: How did you find out about it, that Gary was not to contact outside counsel for the documents?

MR. RIBELIN: I think Gary told me.

MR. FOSTER: Did you ever discuss it with anyone else?

MR. RIBELIN: I don't recall any conversations with anyone else. But I do recall a couple of e-mails, and I believe it's when he was on vacation in San Diego in which he, Gary, brought up the issue again of getting these e-mails.

MR. FOSTER: When was this vacation?

MR. RIBELIN: It must have been August of '05. And in that back and forth, there -- I think my recollection is that there was some hope that we would finally be able to get those e-mails, and so there was some conversation and e-mails. And by the way, I think that it was myself, Jim Eichner, Mark Kreitman, and Bob

Hanson, I believe, who were all copied.

MS. DiSANTO: Just to go backwards, so we have a group of e-mails. Let me go backwards, if you don't mind. Gary Aguirre was seeking numerous e-mails from Pequot. Is that fair to say?

MR. RIBELIN: Absolutely.

MS. DiSANTO: And Pequot's attorneys were concerned regarding the expansive scope of the e-mails that Gary Aguirre wanted. Is that fair to say also?

MR. RIBELIN: I think so. Yeah.

MS. DiSANTO: Did there come a time where Mr. Eichner said, we don't need these e-mails, it's unnecessary?

MR. RIBELIN: I don't -- I don't recall that.

MS. DiSANTO: Was Mr. Eichner included in some of these conversations about trying to get the e-mails?

MR. RIBELIN: I think he must have been. I think he must have been.

MS. DiSANTO: He must have been.

MR. RIBELIN: But I -- but I'm not -- he must have been.

MS. DiSANTO: But you don't recall time where he was complaining regarding the scope of the requests being made by Mr. Aguirre?

MR. RIBELIN: Eichner complaining about the

scope?

MS. DiSANTO: Uh-huh.

MR. RIBELIN: I don't recall. No, I don't.

MS. DiSANTO: Anything -- anything like that.

MR. RIBELIN: No.

MS. DiSANTO: Did you feel the scope of Mr. Aguirre's request to Pequot was appropriate, based on your 18 years of experience at the SEC?

MR. RIBELIN: I did. I thought that it was pretty aggressive, but I thought it was appropriate. I have seen many, many times where, let's say, the staff is aggressive at the beginning, and then maybe is a little less aggressive as time goes on. Gary remained aggressive start to finish.

MS. DiSANTO: I understand. I'm sorry. I just wanted just to understand the nature of the request. I'm sorry.

MR. RIBELIN: It was a very large request and they produced voluminous e-mails. I mean, there's no -- absolutely no question about that. He believed, I think, that these e-mails that were being held back under, in part, the claim of privilege, may have had, let's say, "gems" in them.

MS. DiSANTO: Thank you.

MR. RIBELIN: Yes.

MS. MIDDLETON: Were there some e-mails -- Pequot split, right? Correct? Sometime in '01.

MR. RIBELIN: I believe it was '01. They -- the two guys, Dan Benton and Art Samberg, split and I believe Benton formed Andor Capital.

MS. MIDDLETON: And was there an issue about Andor wanting to give some documents and Pequot objecting? Could you explain about that?

MR. RIBELIN: Gary contacted Andor Capital, at least the attorney representing Benton, and it's my understanding that Andor, and Benton, and his attorney were willing to turn over certain information, part of which may have been from their time they were still together at Pequot.

And my recollection is very vague on this, but that a couple of people, maybe Eichner and maybe someone else, notwithstanding the fact that Gary had gotten agreement from Andor, Benton, and their lawyer to turn it over, that they wanted to go slowly on it and be careful about how it was done.

MS. MIDDLETON: "They" being Eichner?

MR. RIBELIN: Yes. Yeah. I believe it was Jim Eichner. And I would guess, also, that Bob Hanson must have had some involvement. I mean, it was seldom that any significant step was taken without the direct

supervisor knowing about it and kind of, you know, signing off on it.

MR. KIM: So, talking about some of these road blocks, we've covered the January/February 2005 time period. We talked about the discovery dispute with Fried Frank and Gary's involuntary recusal from contacting Fried Frank.

What other road blocks did you perceive in 2005, post January/February of 2005, that hampered the investigation?

MR. RIBELIN: There was -- because of this continuing concern about getting production, adequate production and timely production, many -- there was much back-and-forth between Mark Kreitman, along with Gary and Bob on one hand, and Audrey Strauss and some of her co-counsel on the other hand, about the production process.

And there was one point that it had kind of hit -- we had reached a head, and there was a conference call in which Paul Berger was involved. It was from his office. And Gary, and Bob, and myself were there, and Audrey on the other side, and I think Stan Sporkin was on the line. He had been retained at some point.

MR. KEMERER: That's Judge Sporkin?

MR. RIBELIN: Judge Sporkin. Right. And actually, Berger, who led the conversation, took a

fairly, I thought, assertive tone with the other side, which surprised me, because he was a bit of a source of this, in my estimation, some of the dampening of the enthusiasm of staff to move forward.

So, he took kind of fairly an assertive tone and kind of extracted certain agreements, oral agreements, out of the other side. And one--and this sticks out in my mind--was when we have a witness who is going to show up for testimony on a particular date, we don't want to be getting documents responsive to the subpoena the day before or the day of. Okay. We just don't want that. The usual game -- we don't want you to play the usual game. And they agreed to that.

Notwithstanding that, they, of course, continued to deliver documents on the day of, days after, and weeks after testimony. So there was one point after that where there was another meeting in Berger's office. I think it was just the group of us.

And there was this continuing frustration, that they were dragging their heels and, in part, doing what I guess defense counsel does. But -- and he seemed to back away. He seemed to back away from the assertive --

MR. FOSTER: "He," who?

MR. RIBELIN: Berger. I'm sorry. From the assertive tone he had taken in that conference call with

Audrey and Judge Sporkin.

MS. MIDDLETON: Did Berger back away from that and --

MR. RIBELIN: Well, I mean, I think I may have even said, "Paul, you got them to agree to, as an example, give us the documents before we take the witness' testimony and not doing" -- and he -- you know, he seemed disinterested in the fact that they were backsliding on the oral agreements they had made. That was one example. I'm sure there were a few other things, but that's what sticks out.

MR. FOSTER: What changed?

MR. RIBELIN: I don't know.

MS. DiSANTO: Excuse me one second. I just want to go back one step here. You mentioned that Gary was very insistent regarding a particular set of e-mails that he thought might kind of hold the key to this case. Did SEC ever get them?

MR. RIBELIN: I don't know.

MS. DiSANTO: But do you recall? Would you know if they had gotten them while Gary Aguirre was still there at the SEC? Would you have known?

MR. RIBELIN: Yes.

MS. DiSANTO: So to the best of your knowledge, at this point in time SEC might not have that.

MR. RIBELIN: Well, when he was there, so far as I know --

MS. DiSANTO: You never got them.

MR. RIBELIN: We had never got them.

MS. DiSANTO: Okay.

MR. RIBELIN: And whether or not they have been gotten since, I don't know.

MS. DiSANTO: You don't know. Okay. Thank you.

MR. KIM: So when Berger softened his position on his demand for documents and witnesses and his extraction of oral commitments, when that happened, was that in the spring of 2005? Did that happen close in time to the summer?

MR. RIBELIN: Yes. I would guess probably March or so. March or April.

MR. KIM: Do you know if there were any documents or e-mails contemporaneous with the softening of his position which would memorialize some of the concerns of these impediments, if you will, or lack of enthusiasm from Mr. Berger?

MR. RIBELIN: I don't know. I don't recall seeing any.

MR. KIM: So in addition to the softening of this position by Mr. Berger, what other instances can you

explain and tell us where these road blocks were erected?

MR. RIBELIN: Well, I guess -- let's see. I guess we get to the question about Mack.

MR. KIM: Okay.

Can you elaborate on that?

MR. KEMERER: Would you feel more comfortable if we asked the people from the SEC to leave, or --

MR. RIBELIN: I mean, how do you -- I don't -- how do you guys feel about --

MR. ABRAHAM: I didn't hear the question.

MR. FOSTER: The substantive question or the question about --

MR. RIBELIN: They were just asking if I would feel better if you guys left. I don't --

MS. COBB: We are totally -- that's your call totally. We're happy to abide by whatever you --

MR. RIBELIN: Why don't you stay, at least for now?

MR. PODSIADLY: Actually, before you get to Mack, one thing I wanted to lead up on that, real quick, is -- I think it will lead us to Mack, and that's why I was going to jump in, if you all don't mind. Do you know the name "Eric Denalo"?

MR. RIBELIN: Yes.

MR. PODSIADLY: And Randy Bell?

MR. RIBELIN: Yes.

MR. PODSIADLY: I guess, do you ever recall any time -- when do you recall the first time you heard his name?

MR. RIBELIN: I've known Eric, not well, but known of him for a number of years, going back to the mid-'90s. We did a case -- the SEC did a case of stock manipulation by a boiler room, A.R. Barron, in New York and we felt that it was egregious, and we wanted criminal involvement.

The U.S. Attorney's Office in the Southern District didn't pursue it, we did a proffer to, and then we took the case to John Mosco in Manhattan, and Denalo was one of his litigators.

MR. PODSIADLY: So Denalo was a U.S. Attorney?

MR. RIBELIN: He was a Deputy District Attorney in Manhattan.

MR. PODSIADLY: District Attorney.

MR. RIBELIN: And he, Mosco, and others took the case and got 12 plea deals, and one guy went to trial. And he was the lead litigator on that, and they convicted him. So I knew him from back then. And then he joined Morgan Stanley. And in this period of January on, we had conversations with Denalo.

He was at Morgan Stanley, I think, in their

Regulatory Affairs Division. He handled compliance issues and the like. And Pequot used Morgan Stanley as one of their prime brokers, so we were seeking to get information from Morgan Stanley about Pequot accounts and had conversations with Eric.

MR. PODSIADLY: Okay.

MR. RIBELIN: And then it's, I guess, up to the Mack issue that I know about, and that was in June of '05. Mack announced that -- and Pequot announced that he was going to become chairman of Pequot, and soon thereafter there was speculation that he might go back to Morgan Stanley. And it was at or about that time that a decision was made as to whether or not we take the testimony of John Mack.

Some evidence had been gathered that he was one -- he was a potential tipper in possible insider trading by Pequot in which they bought Heller and sold short GE ahead of a merger in late 2001. A decision was made at some point at or about the time that he had joined Pequot and was about to go to Morgan Stanley that his testimony would not be taken. That was sometime in late June of 2005.

MR. KIM: How as that decision made? Who made it, the circumstances -- on that particular point, not to take John Mack's testimony?

MR. RIBELIN: Who ultimately made it, I don't know. My understanding is that Paul Berger said that his testimony was not going to be taken, but he never told me that himself.

MR. KIM: So how did you find out that Paul Berger said that Mack's testimony would not be taken?

MR. RIBELIN: I think Gary told me. It was -- I have a vague recollection of him mentioning that we're not going to take his testimony, something to the effect that he's connected, and my -- I'm vague on it because it was kind of a whirlwind at that time, you know. We were, you know, trying to figure out what to do next and how to move forward.

Soon after that, I had a conversation--this I have a decent recollection about--with Bob Hanson, and he said something similar to that, that he -- that Mack has connections, or he has stature, or something to that effect, and that because of that, we -- that, you know, we have to be careful about taking his testimony.

And he talked about--and this really sticks in my mind--that at some point earlier, a year or two earlier, there was a prominent individual, and I think that person, he mentioned, was either Bill Gates or Warren Buffett, whose testimony had been taken by the SEC, and somehow the press found out about it.

And as I said to Bob -- I mean, I chuckled and I think I said something like, "Well, if that's a concern, why don't we just call him up on the telephone, you know. So, you know, that way the press won't find out about it, you know, if he's coming in and out of the SEC building."

MS. MIDDLETON: Call Mack up?

MR. RIBELIN: Yeah. And he didn't respond. So, I mean, I thought that that was maybe something that would be doable, but would allay his concern and any other concerns that someone else may have that it would be found out that he had testified to the SEC. Of course, people with prominence testify all the time.

MS. MIDDLETON: At any time were you told later that there were other reasons for not taking Mack's testimony as opposed to --

MR. RIBELIN: Kreitman said, sometime in this period after it had come down that we weren't going to take his testimony, something about, "Well, we have to determine whether or not Mack is over the wall."

And -- which is in reference to the so-called Chinese wall that is supposed to exist between the investment banking division of an investment bank and trading division, such that any material, non-public information can't get into the hands of the traders, you

know, such that they'd be able to take advantage of it.

And I had the conversation with Mark about this and I said, "Well, Mark, that's a moot point," because at the time, Mr. Mack was not, so far as I know, employed at an investment bank. He had left Morgan Stanley in early 2001. He joined C.S. First Boston in late 2001. The trading in question was in July, 2001.

Actually, I think he did join C.S. First Boston soon after the Pequot trading question in Heller, but Gary's theory was that -- I believe, that he might have had access to the information when he was interviewing with C.S. First Boston.

But notwithstanding that, he was not officially employed at C.S. First Boston, so the issue of whether or not he was over the wall was moot. I mean, he would have had to have been employed at one of the two places for that to even be relevant.

MR. FOSTER: This conversation occurred after you heard the previous -- this occurs later in time than the earlier conversations you talked about regarding his stature or his prominence?

MR. RIBELIN: This occurred after. This would have occurred after. I mean, this would have been on the heels of finding out we're not going to take his testimony, and it would have been at or about the time

that Hanson made his comment, well, we don't -- we have to be careful of his connections, his stature, his prominence, whatever he said, that if he's found out -- if it's found out that he's testifying, we don't want to happen what happened to either Mr. Buffett or Mr. Gates. It was right around that time.

MR. FOSTER: Had you ever heard -- prior to hearing the reference to being careful because of his stature or prominence, prior to that, had you ever heard anyone else talk about the need to establish whether he had gone "over the wall"?

MR. RIBELIN: No. No.

MS. MIDDLETON: In any other case that you've worked on in the many years, have there been this kind of -- where you have -- before we can ever question them?

MR. RIBELIN: I will say that in the -- when he focus is on a potential tipper -- let me back up. How shall I say this? What normally happens when we get a referral, we get a chronology of everyone involved in putting together -- the investment bankers on both sides, the lawyers on both sides, the accountants, the PR firms, et cetera, et cetera, and in those chronologies, we usually get multiple chronologies, potentially one from each of the individual entities involved, names of individuals who knew material information, the dates they

knew them, and kind of a chronology, a written chronology of how the negotiations unfolded, when people knew what, and when.

So then that list of people would certainly be a list of people who we would absolutely know had the information, and if we could in any way connect any of those people up with someone who's traded, then that would be the reason, obviously, to go to them. This was different because Mr. Mack was not employed at the time.

So I think it was Gary's thought that, based on the fact that he had been at Morgan Stanley and then went to C.S. First Boston, I think he thought -- I think he had got evidence--I'm not sure of this--that he was in negotiations with C.S. First Boston at the time of Pequot's trading, that maybe he had access to it that way.

MS. MIDDLETON: Were you aware, from the investigation or from Gary, that Mr. Mack had had meetings with the CFO of First Boston?

MR. RIBELIN: I believe that's right. I recall that.

MS. MIDDLETON: Was that something Gary told you or that you actually knew about from e-mails or other information?

MR. RIBELIN: I think Gary would have told me.

I don't think I -- I can't --

MS. MIDDLETON: Do you know the name of that person, the CFO at First Boston at the time?

MR. RIBELIN: I don't.

MR. KIM: When you had this conversation with Bob Hanson where you talked about stature, connection, and Bill Gates, was this in Hanson's office?

MR. RIBELIN: I don't know. I don't know where it was.

MR. KIM: Do you remember if there was anyone else around?

MR. RIBELIN: I don't think so. I think that it may have been in the hallway on his floor. And I don't remember how it exactly unfolded, but my guess is that I confronted him. I mean, it makes sense to me that I -- you know, I heard we're not going to do it and I wanted to find out why, and I asked him why. That was his story. That's what he told me.

MR. KIM: And it was your understanding at the time that -- and you say "we", the SEC, would not take John Mack's investigation, period, or would they take his testimony at some later time?

MR. RIBELIN: It was not my understanding that his testimony would not be taken, period, ever, end of story. The main reason for that is, there were efforts

after the decision came down that his testimony was not going to be taken, and part of it has to do with his over-the-wall concept -- you know, Kreitman was talking about, well, we have to establish that he was over the wall.

Now, I said, "Mark, it's a moot point. I mean, this is chasing up a blind alley, you know." He wasn't at either place, so let's not even talk about that. It's not going to be constructive. But notwithstanding that, he was wanting to try to establish certain things that I suppose, in his mind, would bolster a decision to take his testimony.

MS. MIDDLETON: Do you know whether Gary was -- Mr. Mack met with during this issue?

MR. RIBELIN: I do know he was getting -- trying to get information from -- either from C.S. First Boston -- I believe it was from C.S. First Boston, e-mails between Mack and Art Samberg back in the 2001 period when he was still at C.S. First Boston. I'm sorry, Morgan Stanley. You asked about C.S. First Boston. Okay.

I was talking about Morgan Stanley. C.S. First Boston. I think he was trying to determine what was going on, what the negotiations were. I think, you know, he might have gotten the CFO contact based on that

effort.

MS. MIDDLETON: Was there a subpoena, as far as you know, or e-mails that you already had, interviews of witnesses?

MR. RIBELIN: I don't know. I don't know if he subpoenaed C.S. First Boston.

MS. DiSANTO: You mentioned earlier that Gary had developed some evidence suggesting that Mack was the possible tipper. Did he share that evidence with you, what led him to that conclusion?

MR. RIBELIN: Well, he did, both orally and their e-mails.

MS. DiSANTO: Uh-huh.

MR. RIBELIN: And -- yes, he did.

MS. DiSANTO: Did you agree? Did you agree that this evidence, just based on your 18 years' experience at the SEC, would lead one reasonably to believe that you should take Mr. Mack's testimony?

MR. RIBELIN: Yes.

MS. DiSANTO: Did anyone else agree with you and Mr. Aguirre, that that was the natural course of events?

MR. RIBELIN: I think Joe Cella did.

MS. DiSANTO: Joe Cella agreed?

MR. RIBELIN: I believe he did.

MS. DiSANTO: Okay.

And why do you believe that?

MR. RIBELIN: I think we talked about it. I think the information was shared with Joe, and Joe thought, well, you know -- it seems like --

MS. DiSANTO: That's the natural step.

MR. RIBELIN: It seems like, you know, there's enough here to either subpoena him or talk to him over the phone. I mean, I suggested to Hanson, I mean, if your concern is -- let's talk to him over the phone.

MS. DiSANTO: Uh-huh.

MR. RIBELIN: And I think at one point, Gary was -- Gary may have even said the same thing, let's just call him up and ask him --

MS. DiSANTO: Ask him the question.

MR. RIBELIN: "Did you have information?" Now --

MS. DiSANTO: Do you know if Mr. Berger -- or did Mr. Berger -- was he aware of the evidence that had -- that had been accumulated to lead one naturally to Mr. Mack, or no?

MR. RIBELIN: I don't know. I assume that he did.

MS. DiSANTO: You assume that he did.

How about Mr. Hanson?

MR. RIBELIN: I think so.

MS. DiSANTO: Do you know whether or not Mr. Hanson believed that was the next reasonable step, or did anything ever happen that would lead you to believe that he also believed that at some time?

MR. RIBELIN: I don't know. I mean -- I don't know.

MS. DiSANTO: How about Mr. Kreitman?

MR. RIBELIN: He had the information that Gary had and shared with me.

MS. DiSANTO: Uh-huh.

MR. RIBELIN: I mean, Gary had shared it, I think, with everyone. I mean, there was a very detailed e-mail about what the connections are, possible connections. I mean, the only thing I can -- the only thing I will say, is maybe reasonable minds could have disagreed, do we take him right now or do we get a few more things before we take him.

MS. DiSANTO: Uh-huh.

MR. RIBELIN: You know, phone records, et cetera.

MS. DiSANTO: Right.

MR. RIBELIN: But, I mean, it seemed to come down as fait accompli, we're not going to take his testimony. But then it was after that, then I started to

hear, well, you know, we've got to establish he's over the wall. So, Kreitman seemed to open the door to the possibility that maybe we'll still do it.

MS. DiSANTO: But actually it was, Kreitman opened the door, but he opened the door to an impossibility.

MR. RIBELIN: Well, if he --

MS. DiSANTO: It's like opening the door to --

MR. RIBELIN: If he had continued on that line of thinking --

MS. DiSANTO: Right.

MR. RIBELIN: -- and I tried to disabuse him of it, which he seemed not to be willing to do, then that -- it would have been. Yes. Right. That's right.

MS. DiSANTO: Okay.

MR. RIBELIN: And I didn't know if he was just, like, confused or, you know -- I mean, what worry was going with it. But --

MS. DiSANTO: Thank you.

MR. RIBELIN: Yeah.

MR. KIM: How long of a period of time after Bob Hanson put the kibosh on pursuing Mack -- how long was it after which Kreitman used this "opening the door" metaphor as justification out there?

MR. RIBELIN: This was very close in time, I

think, within a few days or a week -- or a couple of weeks, maybe.

MS. MIDDLETON: Are you aware of a meeting or a phone call between Mary Jo White and Linda Thomsen about Pequot?

MR. RIBELIN: Gary mentioned that such a -- in terms of a phone call, I don't know. Gary told me that subpoenaed documents from John Mack--e-mails, I believe--arrived in the office of Linda Thomsen.

MS. MIDDLETON: Documents that Gary had subpoenaed?

MR. RIBELIN: Yes.

MS. MIDDLETON: Did he tell you anything more, or did you come to learn anything more from others about that?

MR. RIBELIN: He -- I think he was nonplussed that she got the documents and he didn't get the documents from her. And then he -- I think he went down and got the documents.

MR. FOSTER: When you say "he didn't get the documents from her" --

MR. RIBELIN: I'm sorry. Gary got the documents from Linda Thomsen, the e-mails that had been produced by --

MR. FOSTER: And he was upset that he hadn't

gotten them directly from Mary Jo White?

MR. RIBELIN: Yeah. I mean -- yeah. I don't know. Maybe upset is a strong word. I think he was -- he didn't quite know what it meant. I mean, in other words, why he didn't get the documents since had signed the subpoena.

MR. FOSTER: In your experience at the SEC, is that unusual?

MR. RIBELIN: My experience is, usually the person sending the subpoena receives the documents, not someone else.

MR. FOSTER: So you would say it was abnormal?

MR. RIBELIN: It was -- whether it's ever happened before, I don't know. But it was -- it's unusual in my experience.

MR. FOSTER: You've never -- you know of no other time when something like that happened, where the documents were delivered directly to the head of the Division of Enforcement?

MR. RIBELIN: I don't recall any other time that that happened.

MS. DiSANTO: What do you think that meant, Mr. Ribelin? If you were sitting in Gary Aguirre's position, what do you think it meant when he signed the subpoena, he had been getting documents in the past directly in

response to his subpoenas, and now the documents are being delivered to the head of the Enforcement Division? What would it mean if it happened to you?

MR. RIBELIN: Well, I'll tell you -- can I tell you what I would do if it happened to me?

MS. DiSANTO: Uh-huh.

MR. RIBELIN: If it happened to me, I would, first of all, call the person who sent the subpoena documents and ask why they weren't sent to me. Then the person who received the documents, I would go and ask, "Do you know why you received them and I didn't receive them?"

MS. DiSANTO: Do you have a point of view as to why Mary Jo White would send the documents directly to Linda Thomsen?

MR. RIBELIN: I don't know.

MS. DiSANTO: Okay. Fair enough.

MR. FOSTER: Were you aware of Mary Jo White ever being the one to produce documents before? Not to Linda Thomsen, but to lower level staff.

MR. RIBELIN: In this investigation, or --

MR. FOSTER: Had she been involved in -- yes. Had she been involved in document production in this investigation?

MR. RIBELIN: Gary subpoenaed documents, e-

mails, primarily, from Morgan Stanley. He had gotten some e-mails. Those were the e-mails, as I understand it, that showed up in Linda Thomsen's office. And those e-mails were, shall we say, fairly innocuous. There were no smoking guns.

MR. FOSTER: You mean, the e-mails that were delivered from Linda Thomsen's office to Gary Aguirre?

MR. RIBELIN: Right. Correct. Then there were other e-mails that were under subpoena from Morgan Stanley. I mean, I think that Mack went back to Morgan Stanley. Gary Lynch, who had been the GC at C.S. First Boston went back to Morgan Stanley or became CG at Morgan Stanley.

I know there was a conversation or two between Lynch and Gary. Other e-mails that had been subpoenaed, I don't think Gary ever got, from either Morgan Stanley, Mary Jo White, or whoever at that point was responding to subpoenas.

MS. MIDDLETON: Do you --

MR. FOSTER: I'm sorry. Just one more thing. Do you have any basis to believe -- do you have any reason to believe or suspect that the entire production of e-mails that was provided to Linda Thomsen was not provided to Gary Aguirre?

MR. RIBELIN: My impression--I can only give

you my impression--is that a subset of the e-mails were provided to Linda Thomsen from Mary Jo White. Gary went down to her office, picked those e-mails up. They were fairly innocuous. And that the rest of the e-mails that were under subpoena were never received by Gary. That's my impression.

MR. FOSTER: But you don't know whether they were received by Linda Thomsen?

MR. RIBELIN: I don't know. Yeah. I don't know one way or the other.

MS. MIDDLETON: You mentioned Gary Lynch. Was he in charge of the document production at C.S. First Boston before he went to Morgan Stanley?

MR. RIBELIN: I don't know.

MS. MIDDLETON: Do you know who was involved in the C.S. First Boston document production?

MR. RIBELIN: I don't know and I'm not -- and I'm assuming that there were documents produced by C.S. First Boston. I'm assuming that Gary had subpoenaed C.S. First Boston as it related to, at the very least, Mr. Mack's conversations with C.S. First Boston about joining him. But I don't know for a fact that he did that, that he subpoenaed C.S. First Boston.

MS. MIDDLETON: Was there a point in July--maybe it was June--that Gary Aguirre resigned or said he

wanted to resign?

MR. RIBELIN: There were a couple of points, yes, that he was frustrated and was ready to leave. But there was, at some point--I'm trying to think--in June or July where he, I guess, kind of threw up his arms in frustration and said he was going to resign.

MS. MIDDLETON: Do you know what triggered that?

MR. RIBELIN: I think it was a general frustration, a feeling that he couldn't investigate, aggressively, the case.

MS. MIDDLETON: Did he continue to work on the case after that point?

MR. RIBELIN: I think he gave it -- he gave a long notice. And there was one other time earlier in the process where he was frustrated and was going to leave, and told Kreitman that, and Kreitman asked him not to.

MS. DiSANTO: Do you recall when that was, the time frame?

MR. RIBELIN: I'm thinking February or so, give or take.

MS. DiSANTO: A month?

MR. RIBELIN: A month, two months. I don't know. It was kind of -- I'm thinking February, because that was kind of the very frustrating period where, you

know, we were under some pressure to figure out this massive case very quickly, like, at world-class speed, kind of a quick investigation that's never been done that quickly. So he was -- he was incredibly frustrated and he was ready to -- he threw up his arms, and Mark persuaded him to stay.

MS. MIDDLETON: Did you feel that Mr. Aguirre was disorganized in his approach to this case?

MR. RIBELIN: Disorganized?

MS. MIDDLETON: Disorganized.

MR. RIBELIN: Absolutely not.

MS. DiSANTO: Did you feel he was a good writer?

MR. RIBELIN: Yes.

MS. DiSANTO: Did he keep individuals informed of what he was going?

MR. RIBELIN: Yes.

MS. DiSANTO: Did he keep individuals informed about his thinking?

MR. RIBELIN: Yes.

MS. DiSANTO: Did he -- so he was not an individual who would surprise people.

MR. RIBELIN: No.

MS. DiSANTO: So he kept everyone fully advised.

MR. RIBELIN: I -- I think so. Yeah. I mean, he was frequently talking to Mark and talking to Bob and sending e-mails, and talking to me and sending e-mails. So, my -- I believe that he was keeping people fully informed.

MS. DiSANTO: Had Mr. Berger or Mr. Kreitman ever expressed to you that he was a bad employee?

MR. RIBELIN: Well, after he was fired, yes.

MS. DiSANTO: Prior to his being fired.

MR. RIBELIN: Oh. Prior to his being fired? There was a comment or two made by Mark. Mark did, at one point, say -- I believe it was Mark who said, you know, Gary -- this, by the way, runs contrary to what I thought was going on or what my answers just were.

He's like, "I'm out of the loop. I don't know what's going on." But, you know, my impression is, he was -- Gary was sending e-mails and talking to him all the time. And, you know, Mark, every now and then, would just -- he might, on his own --

MS. DiSANTO: Did Mr. Eichner ever express to you concerns that he thought Gary didn't know what he was doing?

MR. RIBELIN: No.

Could I take a quick break? Just one minute. I'll be right back.

(Whereupon, at 4:00 p.m. the interview went off the record and was resumed back on the record at 4:05 p.m.)

MR. KIM: Just to address some of the issues with Mr. Aguirre's ability, his competence, his skills, do you know if there were ever any concerns regarding Mr. Aguirre's issuance of subpoenas that were allegedly violative, violates privacy laws or Commission procedures?

MR. RIBELIN: I learned of a concern about that after he was fired from Mark Kreitman.

MR. KIM: And can you explain the circumstances of the subpoenas?

MR. RIBELIN: After he was fired, Mark asked me to come down to his office. I think it was within a week or so after he was fired. And, of course, he knew that Gary and I had worked closely together and become friends.

And he started it off by saying, "Gary and you have done, you know, tremendous work on getting information together on this case." And then he talked about why he was fired.

And one reason he gave, was that he was -- he was never clear when -- he was never clear whether or not Gary was going to be there or not, because he had a

couple of times that said he was going to leave, he was going to resign. So he said, based on that, he had to staff the case up, put an additional person on the case.

Well, we had actually, just as an aside, asked Mark to put an additional person on the case months before because it had gone from just an insider trading case -- multiple possible insider trading cases to manipulation. That's when Eichner was put on the case.

And then he also said, "And Gary sent out a subpoena that shouldn't have been sent out," and I think it was a subpoena to an Internet service provider, I think, that might -- that violated some -- might have violated confidentiality, or something. It was unclear.

It was unclear what exactly he was talking about, and that that could have subjected the Commission to problems, litigation, or whatever. So he gave those two reasons as to why he was fired.

MR. FOSTER: On the concern about staffing the case.

MR. RIBELIN: Yes?

MR. FOSTER: Was there ever a time when -- you said there were a couple of occasions when Gary said that he was going to resign. When he did that, did he work less on the case? Did his hours drop off? I mean, to your knowledge?

MR. RIBELIN: Well, the first time, he -- I mean, he was kind of almost immediately brought back by Mark, if I recall. In other words, he told Mark and Mark dissuaded him from doing it.

And then the second time when he said he was -- when he gave -- I think it was a very long notification, several weeks or a month or something, I don't think -- I don't think the time he dedicated ever dropped off. I mean, it seemed like it was consistently -- he was going forward at 110 percent.

MR. FOSTER: How much time, from your observations, did he devote to the case?

MR. RIBELIN: There were several weeks that he was spending 60 hours, 65 hours, coming in early, staying late, working at home.

MR. FOSTER: Was that -- I mean, I know you weren't his supervisor, but did that appear to you to be productive time?

MR. RIBELIN: Absolutely. He was always -- he seemed to be always very productive, very focused.

MR. FOSTER: Did anyone else on the Pequot team work those kinds of hours?

MR. RIBELIN: No, not even close. Including myself.

MR. KIM: When it came to the subpoena that was

sent to the ISP, do you know if that subpoena was retracted?

MR. RIBELIN: I think it was. My impression was that there was no -- kind of, no harm, no foul.

MR. KIM: But this was the first time you were hearing about it, after Mr. Aguirre's termination, in Mark Kreitman's office?

MR. RIBELIN: First time. Yes.

MR. FOSTER: In the last question he said "retracted by the SEC." What was your understanding -- what does that mean?

MR. RIBELIN: I think that it was -- I think that it was sent by mistake, and then the fact that it had been sent by mistake was caught. And I don't know the details, but once it was caught, then I think the ISP was called up and said, ignore it, disregard it.

MR. FOSTER: Okay.

So we're not talking about some official action of the Commission that was required to withdraw this subpoena.

MR. RIBELIN: I don't think so. Right. I don't think so.

MS. MIDDLETON: Was there anything other than that with the subpoenas --

MR. RIBELIN: No. I mean, no. I didn't see --

I didn't look at probably most of the subpoenas before they went out. Those that I did see seemed to be standard-stock subpoenas.

MS. MIDDLETON: And was anyone keeping track of which ones were being responded to and which weren't?

MR. RIBELIN: I assume Gary was keeping track of all that. And I'm also aware that he -- I think he had to run the subpoenas by Bob Hanson before they were sent out.

MR. FOSTER: He had to because he was instructed to or because --

MR. RIBELIN: Yeah. That's not -- I mean, yes, because he was instructed to.

MR. FOSTER: Technically, under the Order of Investigation from the Commission, he could send them out on his own? He had the authority to sign?

MR. RIBELIN: Right. I believe so. But --

MR. FOSTER: But he ran them by his supervisor anyway?

MR. RIBELIN: Yeah. Well, he -- there was one point that I think he was not running them by the supervisor, and then another point where Hanson and/or Kreitman asked him to run the subpoenas by Hanson before sending them out, and then he did that from there on out.

MR. PODSIADLY: Just backing up a little bit, I

started earlier asking about Eric Denalo. Are you familiar with, or privy to, a phone call that occurred between Eric Denalo and Mark Kreitman? I know there were some others in the room. Do you recall that?

MR. RIBELIN: This was -- yeah. This was right at the time, or just before the time, the decision was made not to take Mack's testimony. And Denalo was calling. It was in Kreitman's office on speakerphone.

I don't -- I was there, Gary was there. I don't think anyone else was there. I don't know that I was in there when the call was initiated, but -- so they were on the speakerphone.

Two things kind of stand out. One, is that Denalo was very complimentary to Mark of the professionalism that Gary and I had in dealing with Morgan Stanley and Eric.

And then there was a conversation, and it was in the air, I think, at the time, speculation, rumor, that Mack was considering going back to Morgan Stanley. And it was my impression that -- it was more than an impression. I mean, it seemed like Eric was trying to figure out where we were going to go with Mack.

MR. FOSTER: Did Denalo bring up the fact that Mr. Mack was being considered to be the head of Morgan Stanley?

(Whereupon, the documents referred to as Exhibit 6 were marked for identification.)

MR. FOSTER: Those are some notes from Mark Kreitman regarding a call. I don't know if this is necessarily the call you were on, but it's another one that's similar. The second line of the first main paragraph, I'd direct your attention to.

Based on your read of it, what does the "ED" in the margin mean?

MR. RIBELIN: Eric Denalo, probably.

MR. FOSTER: Okay.

MR. RIBELIN: This is Kreitman?

MR. FOSTER: We don't know. Do you recognize the handwriting?

MR. RIBELIN: No. It's not mine. "Urgent message, Bob and Gary. ED obviously read paper. If Mack be considered -- don't want to --"

MR. KEMERER: Is that more detail than you remember from the call you heard?

MR. RIBELIN: Oh, absolutely. Yeah.

MR. KEMERER: So it might be a follow-up call.

MR. RIBELIN: Might be a follow-up call, or it could be in the call and I just --

MR. FOSTER: Before you came in?

MR. RIBELIN: Yeah. Right. Exactly. I mean, I don't -- before -- just you asking me about it now, the only thing I remember was -- the thing that really stuck out was that we'd acted professionally, which we try to do all the time. Although there was one point that Denalo got nervous about something, a request we had made, and he sometimes --

MR. FOSTER: Not during that call, but previously?

MR. RIBELIN: No, no, no. It was another call. It was, like, late on a Friday afternoon and he was very theatrical. So it was -- we all kind of chuckled about it later. But this may have been the call. But I remembered the comment. And then my sense was that he was trying to figure out where we were going to go, were we going to take his testimony, are we looking at him or not. It was fairly brief.

MR. FOSTER: Did he --

MR. RIBELIN: I recall it being 10, 15 minutes, and then I left.

MR. FOSTER: Did he get an answer during the call?

MR. RIBELIN: I don't think so, no. You mean, as to whether or not we were going to take his testimony, or --

MR. PODSIADLY: Or if you were going to do anything with Mack.

MR. RIBELIN: No.

MR. PODSIADLY: If you were doing anything.

MR. RIBELIN: No. I don't -- no, I don't think he got an answer. I mean --

MR. FOSTER: So, I'm sorry. I'm unclear. With regard to whether his testimony would be taken --

MR. RIBELIN: Right.

MR. FOSTER: -- did -- was whether it would be or not conveyed to Mr. Denalo?

MR. RIBELIN: No. In the call that I was on, I remember, no.

MR. FOSTER: Was it hinted at?

MR. RIBELIN: I don't recall.

MR. PODSIADLY: Was such a call from a third party, kind of outside the scope, is that a rare call to have happen, to say, hey, are you investigating so and so?

MR. RIBELIN: Well, in that situation -- in that situation, it seems it's not an experience I recall happening, just because Mack hadn't yet joined Morgan Stanley.

MR. PODSIADLY: So for him to call and ask --

MR. RIBELIN: Yeah. That -- I don't ever

recall ever having that experience. Now, frequently a lawyer will call for a client and try to figure out where we're going.

MR. PODSIADLY: Sure. But outside of a person's representative, a third party --

MR. RIBELIN: Right.

MR. PODSIADLY: -- calling somebody in the Enforcement Division.

MR. RIBELIN: I don't recall that before.

MR. FOSTER: Was Mr. Denalo dealing with SEC staff on the Pequot case frequently before this call, or before the call that you remember?

MR. RIBELIN: Yes. Yeah. Because we had spoken to him a number of times and actually had taken interviews of several people in the prime brokerage in Morgan Stanley in which he sat in and represented them, you know.

And, you know, we did that because Pequot cleared -- did their prime brokerage business primary at Morgan Stanley. So we were trying to get a sense as to how they operated, and so he sat in on those.

MR. FOSTER: So what kind of access to information about what the SEC knew about Mr. Mack would he have had in the course of those representations?

MR. RIBELIN: Gary subpoenaed Morgan Stanley

for e-mails between Mack and Samberg, and Mack --

MR. FOSTER: So he would have known from that subpoena that Mack was a potential target.

MR. RIBELIN: Well, yeah. I mean, we don't --

MR. FOSTER: You don't use the word "target." I understand.

MR. RIBELIN: Yeah. Exactly. Okay. You know that. Okay.

MR. FOSTER: Right. Right.

MR. RIBELIN: Right. Yeah, but he -- let's say a subject or person of interest, or someone we might want to talk to. Yeah. Because I think he and Ashley Wall, who reported to Denalo, who used to work at the SEC, by the way, were handling the gathering, at least initially, of subpoenaed e-mail.

MR. FOSTER: What was Denalo's position at the SEC, and when was it?

MR. RIBELIN: I'm sorry. Ashley Wall was at the SEC.

MR. FOSTER: Oh, I'm sorry. I thought you said Denalo.

MR. RIBELIN: She, Ashley Wall, was a staff attorney in the Enforcement Division who reported to Denalo at Morgan Stanley and who was involved in the production -- the gathering and production of e-mails--or

at least I thought--from Morgan Stanley to us.

MR. KEMERER: This might help.

MS. MIDDLETON: We are marking this Exhibit as 7.

(Whereupon, the document referred to as Exhibit No. 7 were marked for identification.)

MS. MIDDLETON: We're just wondering if this refreshes your recollection about some of the document production that we've been talking about.

Did you receive this e-mail? Do you recall receiving this e-mail?

MR. RIBELIN: Let me just go through it, briefly. I see that I'm cc'd on it, so I must have. This puts it in perspective. Do you mind if I just kind of read it?

MS. MIDDLETON: Take your time.

(Pause)

MR. RIBELIN: I remember this. I remember a conversation with Gary about this where her tone changed.

(Pause)

MS. MIDDLETON: Do you know whether what I'll call the Mack e-mails stopped after this point? The production of those documents stopped after this point?

MR. RIBELIN: Yeah. I mean, we touched on that

earlier. I -- to my knowledge, we got the one batch that went from Mary Jo White to Linda Thomsen that Gary picked up, and then that was it and that there were no additional -- there were no additional --

MS. MIDDLETON: In your view, were there -- did the subpoena request additional documents, other than what had already been produced with that last batch from Mary Jo White?

MR. RIBELIN: I don't know what all they asked for, but I think -- I guess it's here. But I guess the main focus was on e-mails, and he thought that there would be more e-mails based on a conversation he had with her, and then she backed away.

MS. MIDDLETON: "She" being Ashley?

MR. RIBELIN: Yeah.

MS. MIDDLETON: Thank you.

MR. RIBELIN: By the way, she is still at Morgan Stanley, and Eric Denalo has left Morgan Stanley.

MR. PODSIADLY: Following the whole Denalo call with Kreitman, it's my understanding that there was a meeting to be held between Mr. Berger, Mr. Hanson, Gary, and yourself, and it was to be held down in one of the office spaces. Can you elaborate on that meeting?

MR. RIBELIN: I think within a day or a week, the meeting with -- or the conference call in which I was

in the office that was just talked about, Denalo was calling, talked about our professionalism, seemed to be wanting to figure out what was going on with Mack, it was going -- there was a meeting that Gary was supposed to attend with Berger--Paul Berger--and Bob Hanson.

And I didn't know whether or not I was supposed to attend it or I just happened to be in Gary's office when he said, you know, I've got to go talk -- or we've got to go talk to Berger and Hanson.

We walked down to Berger's office, which was in the corner, and the door was closed, and Hanson was in there, Berger was in there, and they seemed to be talking in hushed tones. That was -- that may have been the day after the conference call, or it may have been the same day that Denalo was on the phone. I remember that the door was closed and it was going to stay closed.

MS. MIDDLETON: Are you saying you were uninvited to the meeting?

MR. RIBELIN: That was the impression, yeah. And I -- I mean, I presume that was the meeting that Gary talked about that he was about to go into. Now, maybe there was another meeting, but when we got there and they saw us, the --

MR. KEMERER: They didn't rush to the door.

MR. RIBELIN: Berger seemed like he didn't

really want to see us.

MS. MIDDLETON: Just so I'm clear, Hanson invited Gary.

MR. RIBELIN: I didn't know if it was Hanson or Berger, or both.

MR. PODSIADLY: You mean to say, those two were in the office and Gary was supposed to be there. You were unclear as if you were supposed to be there or not.

MR. RIBELIN: Right. I mean, it's my impression that Gary was supposed to be in that meeting. I mean, maybe there was another meeting scheduled after those two guys were meeting behind closed doors.

But it was at the time that Gary was supposed to be in the meeting. And I was either supposed to be there with him or I happened to be in his office, and he said, "Why don't you come down with me?" And we got there and the door was closed and they didn't want us to be there.

MS. MIDDLETON: So neither you nor Gary went into the meeting.

MR. RIBELIN: Right.

MR. PODSIADLY: What sort of happened after that meeting in regards the whole Mack investigation at PCN?

MR. RIBELIN: Well, sometime in this period,

within -- I mean, I think that that was the same day or the day after the Denalo conference call, and it was soon after that that the word came down, we're not going to take his testimony.

MR. FOSTER: So when you say "the word came down," word came down from who?

MR. RIBELIN: Well, I mean, that -- I mean, that I heard that we're not going to take his testimony and that --

MR. FOSTER: Well, you said "came down." Did you get the sense that it had come from a higher level than the people you had previously been dealing with?

MR. RIBELIN: My impression, and I think even what I heard, was it was delivered by Berger. It was delivered by Berger --

MR. FOSTER: The news that you weren't going to take his --

MR. RIBELIN: That we were not going to take his testimony.

MR. FOSTER: -- Mack's testimony.

MR. PODSIADLY: In saying "delivered by", that means that he was just the one giving it, but not necessarily the one who decided it?

MR. RIBELIN: Yeah. I don't know who decided it, but that he was communicating that down the chain.

MR. KEMERER: Do you recall, does Paul Berger still work for the SEC?

MR. RIBELIN: No.

MR. KEMERER: And do you recall approximately when he left?

MR. RIBELIN: It was maybe, I would say a couple of months ago, three months ago, something like that.

MR. KEMERER: And do you recall -- do you happen to know where he went?

MR. RIBELIN: He went to Debevoise.

MR. KEMERER: In Plimpton?

MR. RIBELIN: In Plimpton.

MR. KEMERER: Is that the firm that Mary Jo White serves as a member, a partner, at that firm? Is that right?

MR. RIBELIN: Yes.

MR. KEMERER: And do you have any idea, based upon conversations with Mr. Berger or others, when he started interviewing, looking to go to Debeboise's?

MR. RIBELIN: There were rumors or speculation that were fairly widespread in the Division of Enforcement, I would say, maybe as early as September of last year that he was going to go to Debevoise, and didn't -- I heard from -- I mean, I think they were kind

of widespread, that he was either going to go or was talking to them.

MR. FOSTER: I'm sorry. When did you first hear that talked about?

MR. RIBELIN: I think it was in September of last year.

MR. FOSTER: Is there a reason that you recall it being September?

MR. RIBELIN: Well, I mean, it was --

MR. FOSTER: Do you know the -- I'm sorry. Do you know of the existence of any records or documents that would help refresh your -- that might refresh your recollection about the time frame that you had learned about that?

MR. RIBELIN: I may have received an e-mail from someone who said, did you hear he's going to Debeboise. I mean, I -- there are probably some people I talked to just to -- I mean, I'm pretty sure. I mean, the thing is, it was in October. He was an Associate Director, and Linda was opening two Deputy Director positions.

And so, of course, there was speculation who among the Associate Directors would be the most likely to be candidates who were going to get the Deputy slots. And, you know, Berger was certainly a possibility, Tony

Shion, Peter Bresnan.

Walter Richardi, who ended up becoming a Deputy who was in Boston at the time, his name was bandied about as a possibility. So, there was -- in this period in the autumn, people were speculating who were going to get the slots. And the announcement was sometime in October that the slots were -- that it was Peter Bresnan, who was an Associate in Washington, and Richardi, who was a District Administrator in Boston, would be getting slots.

And then so there was talk, you know, well, Berger must be very disappointed. It was prior to that that there were rumors that he was leaving, that he was going to Debevoise. So I think that there was speculation that he must have gotten some earlier indication that he was not going to get one of the two slots, that therefore, you know, he was just going to leave. It was fairly widely speculated, I think.

MR. PODSIADLY: So I guess, to sort of sum up a little bit and get to the next topic, essentially in your time with the Pequot matter, it was not necessarily a dormant case, but not too much being pursued. Gary steps on board, really ramps up, and then for some reason or another the case starts to go towards Mack, evidence leaning there.

Then it starts to -- after this strange phone

call with Denalo which is sort of out of line with the way normally things are there, and then also the meeting that you sort of walked in on, after that, what happened? Things started to -- where did they go from there?

MR. RIBELIN: So that would have been late June. I think, you know, at some point -- I think Gary went on vacation in late July or August. I think that there were, at some point, continuing efforts made on Gary's part to try to bolster the case to take Mack's testimony. It was kind of a relatively slow month.

MR. FOSTER: Dog days of summer.

MR. RIBELIN: Yes. But he -- I mean, I think he continued to work on other aspects of the case. I mean, there was -- you know, we had a meeting with the U.S. Attorney's Office in the Southern District that included Mack. It also included, you know, trading and another issue, so there was still work to be done on that. But --

MR. PODSIADLY: So what was sort of the -- what was the morale and kind of, you know, the general feel? What was the scuttlebutt around the office amongst the team that was sort of working this case?

MR. FOSTER: In August?

MR. PODSIADLY: Yeah, in August.

MR. RIBELIN: I think there was frustration,

and I think at the same time there was also maybe a sense that, you know, we can't do it now, but maybe can, at some point, make a case.

And then, you know, the other thing is, we -- I mean, there was the other case, the trading in Microsoft, and then this whole other aspect that I was interested in, that my guys were interested in, the possibility that there was market manipulation going on, so we turned a lot of our focus to that.

MR. KEMERER: Market manipulation through fraud, or wash trades, or --

MR. RIBELIN: Wash trades, trading -- doing wash trades in the immediate IPO market and secondary market, and also some other kind of unusual trades that were -- seemed almost nonsensical.

It was like, artificial trades were maybe being sent out to -- so that they could trade opportunistically. We spent a lot of time looking at that and consulting with people. Then later on after he was fired, at the audit I spent a lot of time working on that.

MR. FOSTER: Could you explain, just very briefly, for those of us who aren't SEC veterans, what "wash trades" are?

MR. RIBELIN: They were getting -- one thing

is, they were getting allocations in an IPO, in multiple stocks, and we would see that the very first -- among the very first trades, when the stock is released for trading in the market, we would see them -- for example, they would get 100,000 shares in the allocation of ABC stock. We were seeing them do a simultaneously buy and sell order, like an immediate after market.

And so there was a concern, okay, are they doing this in order to somehow affect the market, you know, increase the volume in the market, to get the market going, or were they doing it at a premium to what the IPO price was to get the market moving upward? So there was a focus on that. And then there was another -- I don't know.

I'd turned over a memo laying out one of the scenarios having to do with an apparent buy and short sale of the stock. Trades were executed against each other, which is kind of nonsensical. It doesn't make -- it's hard to figure out.

And then trading that followed that, that seemed to suggest maybe they were setting up a position whereby they can trade on either side of the market to take advantage of whatever advantage is presented.

It's a little complicated, but -- so we were looking at those issues and we had turned our attention

to that after Gary left, although Steven Glascow was still helping Eichner on the insider trading aspect of the case.

MS. MIDDLETON: With respect to that insider trading case, did Gary ever talk to you about a statute of limitations or his concern about the speed with which things are happening in the summer of '05?

MR. RIBELIN: Yeah. Heller -- the Heller trading was in July of '01, so he was concerned about the statute running. And for that reason, you know, we had to try to move quickly to figure out whether or not there was a case.

MS. MIDDLETON: Is that all he said, or was there more to it?

MR. RIBELIN: I think that was basically it.

(Whereupon, the document referred to as Exhibit No. 8 was marked for identification.)

MR. PODSIADLY: This is an e-mail between you and Hanson. I wonder if you could just elaborate a little bit on the section you had written to him on the 4th of August, particularly, I guess, the last couple of lines which you were --

MR. RIBELIN: Well, you know, this C.L. King thing -- I'd forgotten about this. But these potential

match trades, wash sales, were being done through this boutique brokerage firm in upstate New York called C.L. King. They were trades being done for Pequot by C.L. King.

We had information that they were being executed by C.L. King. These are the trades where C.L. King would execute a buy by one entity associated with Pequot against a sell of another entity associated with Pequot.

We had reason to believe those two entities that were buying and selling with each other were one and the same. They were in league with each other. So to that extent, that would potentially be an illegal trade, a trade that would show essentially artificial buying in the market.

So we wanted to go to C.L. King, and it seemed like, you know, we would make a recommendation of what we needed to do, we would advance our basis for doing it, and, you know, sometimes we'd get these guys hemming and hawing, and other times they would agree. And then it looks like here he backed away.

Some of the most straightforward, simple investigative steps that you would take, it seemed like, we had to jump through hoops. That is, I think, what this is referring to.

And, you know, I mean, I talk about, the "staff" here is in relation to -- is specifically in relation, I think, to the possible manipulation, because, you know, I have one guy, Tom Conroy, who is a Vietnam vet, he's in his mid-50s, he's been at several brokerage firms, he's been at CFTC, he's been at the futures markets in Chicago, he's seen and done a lot and he's aggressive, and he was equally frustrated with Hanson and whoever else stopping us from doing the most simple investigative things.

MR. FOSTER: Did you have further conversation about this, other than the response that you got at the top of the page from Mr. Hanson?

MR. RIBELIN: We continued to push. I don't know how much of it is a personality difference.

MR. FOSTER: But specifically, though, did you leave it at this? I mean, was this the end of the exchange on this topic or did you continue it in person or on the phone, what?

MR. RIBELIN: We continued to push to try to figure out what was going on on the manipulation side and continued to talk about, let's meet, let's talk, we want to work this out, we want to work as a team. But it just never jelled. I mean, it was a frustration from beginning to end.

MR. PODSIADLY: Can the same frustration be applied to the insider trading side of this whole investigation?

MR. RIBELIN: On the manipulation side, it seemed to be Bob. And I think some people suggested may he just didn't get it and was still trying to learn. On the other side, it seemed like it was coming more from Berger.

MR. PODSIADLY: You mean, on the insider trading side?

MR. RIBELIN: Yeah. It was coming more from Berger.

MR. PODSIADLY: Resistance to aggressive investigation --

MR. RIBELIN: Yeah.

MR. PODSIADLY: -- was coming from Berger?

MR. RIBELIN: Yeah.

(Whereupon, the document referred to as Exhibit No. 9 was marked for identification.)

MR. RIBELIN: I'm sorry. Could I take one more very quick break?

MR. PODSIADLY: Yeah. Sure. No problem.

MR. RIBELIN: I'll be back. Just -- sorry.

(Whereupon, at 4:45 p.m. the

interview was recessed and resumed back on the record at 4:47 p.m.)

MR. RIBELIN: What is the Bates I should focus on?

MR. PODSIADLY: I guess, closing out Bates 1250, that one was an e-mail to Hanson regarding market manipulation.

MR. FOSTER: And that's been marked Exhibit 7, right? 1250?

THE REPORTER: The one that we just now marked is Exhibit 9.

MR. FOSTER: Okay. So 1250 is 8.

MR. PODSIADLY: But then look at Bates 851.

MR. RIBELIN: 851?

MR. PODSIADLY: Yeah. It's 851 through 856. I kept the whole chain. It's page 851. Oh. Yeah. Both of these were produced -- just for the record, were produced late last evening.

MR. FOSTER: To the Finance Committee. The Judiciary Committee?

MR. KEMERER: The Judiciary Committee got 851, I think, the day before yesterday. But we didn't get the previous exhibit until this morning.

MR. FOSTER: 1250.

MR. KEMERER: 1250.

MR. PODSIADLY: For the record, a correction on my part. 851 would have been received the same day as Judiciary, and 1250 would have been the day before. So, yesterday evening.

MR. RIBELIN: So I look at 851?

MR. PODSIADLY: Yeah. Take a look at that one.

MR. RIBELIN: Okay.

MR. PODSIADLY: And so this e-mail here marked Bates 851, Exhibit 9, is that related to sort of the frustration on the insider trading portion?

MR. RIBELIN: My bottom e-mail to Hanson?

MR. PODSIADLY: Yes.

MR. RIBELIN: Let me go to the top, if you don't mind.

MR. PODSIADLY: Oh. Sure.

MR. RIBELIN: I thought I said "something smells wrong," and I recall that.

(Pause)

MR. RIBELIN: Oh, yeah. This is it. This is me trying to withdraw in the case.

MR. PODSIADLY: I'm sorry. What was that?

MR. RIBELIN: This is me trying to withdraw from the case.

MR. PODSIADLY: Okay.

MR. RIBELIN: This is me wanting to get out.

(Pause)

MR. RIBELIN: Okay. This is frustration on the insider trading front. Is this after he was fired, September 8th?

MR. PODSIADLY: Yes.

MR. RIBELIN: Yeah. Okay. Yeah. It's coming back to me now. Yeah. So -- okay.

MR. FOSTER: Can you just kind of narrate the impetus of this whole exchange?

MR. RIBELIN: This is them revisiting, I think, if I recall, taking these -- these other investigative steps to determine whether or not it was worth pursuing this, I think. I remember Kreitman, for example, wanting to know, well, how much -- what was the quid pro quo from that.

And, you know, it was already articulated by Gary, you know: he was involved in a deal. He was given access to the deal. They were friends. They were in constant communication, et cetera, et cetera. I mean, at one point I think -- oh.

At some point I think Mark wanted to determine, well, how much did John Mack gain individually -- stand to make individually from the trade in Heller and GE. So they were asking these questions that seemed to -- I don't know. It didn't make sense. I mean, it seemed

like the case had been made, as good a case as possible was made, that this is a potential tipper.

MR. FOSTER: Is it typical for the tipper to significantly financially benefit from the trades that the tipee makes?

MR. RIBELIN: Often not. Often, you know, there could be a reputational benefit that is derived, or there could be some other -- I think one of Gary's theories was that Mr. Mack was given -- got involved in a deal that was offered to him by Mr. Samberg. What's the name of it?

MR. KEMERER: Distressed something, or --

MR. RIBELIN: Yeah, yeah, yeah. Distressed something. Distressed debt. There's a name for it.

MR. KEMERER: Fresh Start.

MR. RIBELIN: Fresh Start.

MR. PODSIADLY: Fresh Start.

MR. RIBELIN: Fresh Start. That's it. And that it was -- I don't want to use -- he had -- he was given access to that I think, and that was -- that was a boon to Mr. Mack, that he was able to get into that, and that maybe -- I mean, there are a lot of ways that you can do a quid pro quo. It doesn't have to be directly getting many or being part of the actual trade that is potential insider trading.

I think Mack was one of hundreds or thousands of investors and funds, so his portion obviously would have been a small fraction. Mark seemed -- at one point wanted to try to determine that and it didn't make sense. But --

MR. PODSIADLY: What did you mean in the second line, the fourth e-mail down, about "fixated on the size of the trade is aberrational"?

MR. RIBELIN: Oh. I think another thing was, if I recall this correctly, that the GE-Heller trading was consistent with all their other trading. There were thousands of other trades that they did. Well, they're a $7 or $8 billion hedge fund, so they do $10, $20, $30, $50 million trades as a matter of course. It's not a big deal.

And I think the size of GE-Heller, or the trading -- let's just take Heller. The size of the trading in Heller, it was a big trade but it was not necessarily an outlier. I mean, it's not necessarily bigger than the other trades that they would do. And to say that, therefore, it's not suspicious is -- I think that that was the hint.

MR. FOSTER: But it was large relative to the number of shares traded in Heller on those days.

MR. RIBELIN: It was, in fact, I think. I

recall that. But I think that there were some --

MR. FOSTER: They wanted to focus on comparing it to the trades in other stocks --

MR. RIBELIN: That they had done.

MR. FOSTER: -- that Pequot had engaged in.

MR. RIBELIN: Had done. Right.

MR. FOSTER: Was that something that they had -- when I say "they" I refer to the folks at the SEC who did not want to take Mack's testimony earlier. Was that a rationale or an argument that had been raised prior to Gary Aguirre leaving?

MR. RIBELIN: It may have been. But it seems like this is all happening after. I mean, there may be other e-mails that reflect that it happened before. But, I mean, the point -- you know, my point was, these guys are smart.

I mean, they're not -- okay, so the trade is, like, right in the middle of the size of trades. That's one way that you make it look like everything else, and therefore it's not going to stand out and be a red flag. So --

MR. FOSTER: But it was red flagged. It was part of a referral from the SROs. What was it that made it a red flag?

MR. RIBELIN: Well, the trading and proximity

to announcement.

MR. FOSTER: Do you have an understanding of whether the systems that flagged suspicious trades would also take into account things like the percentage of the total trading volume that day or orders that were unfilled because they were so large that they couldn't be filled?

MR. RIBELIN: I think, typically not.

MR. FOSTER: Typically not?

MR. RIBELIN: Yeah.

MR. FOSTER: Does anybody have any more questions on that?

(No response)

MR. PODSIADLY: We're switching gears. We wanted to ask you a little bit about policies at the SEC for recusal, when somebody needs to recuse themself in a matter. Is there a standing policy that you're aware of at the SEC regarding when -- what kind of contacts? What rises to a level where somebody should recuse themself from a matter?

MR. RIBELIN: My understanding is that if you are -- if you fall within a so-called covered relationship, for example, family member, that would be an immediate grounds for recusal.

MR. PODSIADLY: Okay.

MR. FOSTER: Are there written guidelines that give you more detailed direction?

MR. RIBELIN: I don't know.

MR. FOSTER: Have you ever been instructed, formally or informally, about when you're supposed to recuse yourself?

MR. RIBELIN: Well, interestingly, a few weeks ago I had a situation, I'm working on a case where -- it's a stock manipulation, a company based overseas, and there is an entity that -- I just got a translated document from Leandra, and the name of the entity is an entity where a friend of mine is now employed. He's a lawyer at this place.

And I immediately wondered, well, in -- and in the translated document there's some suggestion that maybe they were involved in trading. Since we're talking about stock manipulation, anyone involved in trading could be implicated.

So I -- when I saw that, I went to my boss, Joe, and said, "You know, my buddy works there. He just went over there. He'd been a staff attorney, a Branch Chief, in Enforcement for a number of years. What do you think? Do you think there's conflict?" He said, "I don't think so. Call the Ethics Office."

So I talked to Anita Purcell in the Ethics

Office and she said, well, it's not a covered relationship. You're friends. But you probably don't need to recuse yourself, but put together a -- put together the facts in a letter and send the memo to Joe, and copy me on it.

And then I went to the web site for the Ethics Office and they lay out -- they laid out some guidelines. And one of the guidelines is, if it's a covered relationship, you want to recuse yourself. Then there are some other things, kind of legalese, that I'm still kind of sorting through.

MR. FOSTER: So generally then --

MR. RIBELIN: I may have to consult someone, if anyone's available.

MR. FOSTER: So generally speaking then, when -- you seek counsel from the Ethics Office on individual matters.

MR. RIBELIN: That's -- yeah. I mean, that's --

MR. FOSTER: When you have a concern.

MR. RIBELIN: I think that's the -- there was one other time that a buddy of mine went to a stock exchange, and I talked to Joe and Joe said, "Well, why don't you not work on any matters that come from there," so I didn't. But at any rate, there is, in the Ethics

Office, I think a two-pager of guidelines.

MR. FOSTER: And you have recused yourself in various cases before?

MR. RIBELIN: A couple of times.

MR. FOSTER: A couple of times.

MR. RIBELIN: Well, one time.

MR. FOSTER: And when you do that, how is that effectuated? Do you draft a memo, do you -- who do you inform?

MR. RIBELIN: The one other time, I did not draft a memo. This time I was instructed by Anita to draft a memo.

MR. FOSTER: So the guidelines on the web site that you were talking about earlier don't tell you anything about how you are to communicate the recusal and to whom you are to communicate the recusal? I mean, we can go look later. But just --

MR. RIBELIN: Yeah. No. Yeah. She said to send it to Joe and to copy her. And then I went back and I asked for -- you know, can you give me form or some standardized language, and there wasn't any. So, I will work with her then in formulating this.

MR. PODSIADLY: I guess, sort of on the same page, have you ever been involved in any FOIA requests at the SEC?

MR. RIBELIN: Involved in what way?

MR. PODSIADLY: I guess, it's my understanding that they're handled by a FOIA officer or the General Counsel's Office. Have you ever had any dealings with FOIA requests for something that you were working on?

MR. RIBELIN: Our FOIA officer is a guy by the name of Don Chumley, and he, from time to time, will come by and say, "We have a FOIA request. This is a case you're working on, or at least the records indicate you're working on it." And so I either turn over or don't turn over documents. I mean, that's happened a few times.

MR. PODSIADLY: And he tells you what you can and can't, or do you turn everything over to him and then he makes the decision?

MR. RIBELIN: It has been a very long time since I dealt directly with him on something I was working on.

MR. PODSIADLY: Do you remember the case?

MR. RIBELIN: No.

MR. PODSIADLY: Okay.

MR. RIBELIN: No.

MR. PODSIADLY: Do you ever remember hearing anything regarding a FOIA complaint related to Eastmann Kodak?

MR. RIBELIN: There was -- Eastmann Kodak.

MR. FOSTER: Around the February of '05 time frame.

MR. PODSIADLY: February. There was a -- I was in Mark Kreitman's office with Gary Aguirre, and it was in the winter time, and Chumley came into the office--and I don't remember what the stock was. It may have been Eastmann Kodak--and said something like, "What's going on with this case with the FOIA request?"

And then it may have been a case that Gary was actually assigned. I'm not sure. And it had to either be that or a case that someone under Kreitman was assigned, otherwise he wouldn't have, you know, been in the office. And he -- and then they talked.

Kreitman and Chumley went back and forth, and then Chumley said something like, or should I just tell them about the Humes lie, or should I just tell them about -- or should we just use this reason to not deliver the documents over? There was back and forth and Kreitman waved him off and he said, no, or something like, we do things above board. And --

MR. FOSTER: So was there discussion about whether -- was the issue whether the case was open or closed --

MR. RIBELIN: I think.

MR. FOSTER: -- and whether or not that could be used as an excuse not to provide the response to the FOIA request?

MR. RIBELIN: I think that's right. Yeah.

MR. KIM: You mentioned the "Humes lie." Can you explain what that is?

MR. RIBELIN: I don't know. I mean, my impression was, it was a reason that Chumley had heard before to be able to not turn over documents that may be FOIAble.

MR. KIM: And what is that reason?

MR. RIBELIN: I don't know. I presume that -- it's an assumption on my part that it's -- if the case is inactive or closed and you say it's active, and therefore the documents wouldn't be FOIAble, that you say it's active, therefore you don't have to give them at all.

MR. FOSTER: Did you know who he was referring to, who the "Humes" is that he was referring to? Did you know that at the time?

MR. RIBELIN: I presumed Richard Humes.

MR. FOSTER: You assumed that at the time you heard it?

MR. RIBELIN: Yes.

MR. KIM: Is this the first time you heard about the Humes lie?

MR. RIBELIN: Yes.

MR. FOSTER: Have you heard about it since?

MR. RIBELIN: No.

MR. FOSTER: Have you ever heard, in any other context, someone suggest that representation be made that a case is open when it is, in fact, closed or inactive in order to avoid providing information responsive to a request of any kind, FOIA or otherwise?

MR. RIBELIN: No, not that I can recall.

MS. MIDDLETON: Have you spoken to the Inspector General of the SEC?

MR. RIBELIN: Yes.

MS. MIDDLETON: When have you done that?

MR. RIBELIN: This was maybe three or so weeks ago. Four weeks ago.

MS. MIDDLETON: Four weeks ago?

MR. RIBELIN: Three or four weeks ago, maybe.

MS. MIDDLETON: Did they contact you?

MR. RIBELIN: They did.

MS. MIDDLETON: And had you spoken to them prior to that at any time?

MR. RIBELIN: No.

MR. KEMERER: Which representative from the IG's office contacted you?

MR. RIBELIN: I got a call on a -- it was

either Tuesday or Wednesday, from a Kelly -- I believe, Kelly Andrews, and she asked whether or not I could come down the following day to talk with IG about the Gary Aguirre termination, and I did. And she was there with Mary Beth Sullivan.

MR. KIM: Just to be clear, so you never spoke to anyone in the IG's office after Gary Aguirre's termination in September of 2005 regarding the Gary Aguirre matter?

MR. RIBELIN: Right. Up until just a few week ago. Yes.

MR. FOSTER: Any time during the fall of 2005?

MR. RIBELIN: No.

MR. PODSIADLY: But after? It was after August 2nd, right?

MR. RIBELIN: Yeah. It was -- I could probably pinpoint it exactly. It was early August, right in there.

MR. PODSIADLY: Okay. Of 2006?

MR. RIBELIN: Of 2006. Yeah. For the first time. Yeah.

MR. PODSIADLY: Okay.

MR. KIM: Did you provide any documents to the IG's office in the last eight months?

MR. RIBELIN: No, I've never provided

documents.

MR. KIM: Have they asked you for any documents?

MR. RIBELIN: No.

MR. KIM: So the purpose of the meeting was just to sit down with Kelly Andrews and talk about the Pequot investigation and your interaction with Gary Aguirre, and questions about Gary Aguirre?

MR. RIBELIN: Among other things, yeah.

MR. KIM: What were those other things?

MR. RIBELIN: Well, at the end they asked me whether or not I had been contacted by anyone else.

MR. KIM: By who?

MR. RIBELIN: Whether or not I had been contacted by anyone else about the investigation.

MR. KEMERER: Like, for instance, Congress, or --

MR. RIBELIN: Like Congress. Yeah.

MR. KEMERER: Was it your impression that this was a friendly interview that they had with you, or was it more, like, intimidating?

MR. RIBELIN: I wasn't intimidated, but I wouldn't characterize it as friendly.

MR. KIM: Was the interview just with Kelly Andrews?

MR. RIBELIN: And Mary Beth Sullivan. Yes. There were a couple of points that I felt nervous, but --

MR. PODSIADLY: How long did it last?

MR. RIBELIN: It was quite long. Three and a half hours, I think.

MS. MIDDLETON: What were the points where you felt nervous, if you can tell us?

MR. RIBELIN: Well, at one point I -- you know, I was -- I mean, I was very, very open, and also, you know -- I mean, it's been an ordeal, this whole thing. And I kind of expressed that and told them, you know, I just want to do my job. It's all I've ever wanted to do.

At one point, they seemed to be relatively assertive in their questioning, which I guess caused me to feel like, you know, I'm not sure where this is going. And I made the comment, "You know, and understand, I almost feel like I have a target on myself right now." And --

MR. FOSTER: What was the subject of that questioning?

MR. RIBELIN: I don't know that it was anything in particular, but -- I mean, it must have been, but I can't recall what it was. But I was -- and she said -- she made some reference to, "Well, there are whistle blower statutes".

And I was getting ready to say something along the lines of, "You know, I don't feel I'm a whistle blower. I feel like I'm -- I am being asked, and probably will be asked, to give my understanding of what happened, and I'm going to do it." And then she said something to the effect, "Well, that's all we're just trying to do, is get information."

MR. RIBELIN: Is this "she" Kelly Andrews or was it Mary Beth Sullivan?

MR. RIBELIN: I think it was Mary Beth who said that. Mary Beth asked 80 percent of the questions.

MR. FOSTER: Were you aware, at the time of your interview, that they had previously conducted an investigation last fall and had closed it without speaking to you?

MR. RIBELIN: I was aware of that, yes.

MR. FOSTER: How were you ware of it?

MR. KEMERER: Was it in the report to Congress?

MR. RIBELIN: I think I read about it. I think I read --

MR. KEMERER: After April of this year when this became public?

MR. RIBELIN: Yeah. I think I read about it in the paper, that the IG report had been -- that the investigation had been done, had been closed and then

reopened. I was there at the time after it had been reopened.

MR. FOSTER: So you didn't know, contemporaneous with them having an open investigation, that they had an open investigation on Gary's firing?

MR. RIBELIN: I did not.

MS. MIDDLETON: Did you finish your answer about the times you felt nervous during the interview?

MR. RIBELIN: Well, they asked me -- you know, frankly, they asked me about my relationship with Gary. And, you know, I -- how often we talked to each other, how often we see each other, have you ever gone out socially with him. I answered all those questions. But I -- you know, I didn't know where they were going with that and what they meant by it.

MR. KIM: Was it your impression, based on your three and a half hours with the IG representatives, that the focus of their investigation was targeted towards Gary Aguirre rather than underlying allegations that he's making in connection with the Pequot investigation?

MR. RIBELIN: You know, I guess I don't know. I mean, I went -- I'll just tell you, I went back to the very beginning and kind of gave the chronology of how things unfolded, similar to what I've done here.

They showed me a couple of e-mails -- two or

three e-mails of mine that I didn't know where they were going with them. But I don't know. I mean, I think, both. It was kind of both.

MR. FOSTER: Did they show you any of the e-mails that we've shown you today?

MR. RIBELIN: No.

MR. FOSTER: No?

MR. RIBELIN: No.

MR. FOSTER: Well, do you recall what e-mails they did show you, or generally what they were about?

MR. RIBELIN: One e-mail was my -- it was at or about the time that Gary indicated Linda Thomsen had received e-mails from Mary Jo White. I mean, it must have been a little bit after this.

He sent me a draft of a letter that he was going to send to Linda about, you know, kind of a -- I think this was a request to sit down and talk about the investigation, what was going on.

And in the response, I said something about Gary Lynch. And I think Gary Lynch must have been mentioned in this draft e-mail, although I can't recall that for sure. And I said that -- in the e-mail, Gary Lynch investigated Bosky and Millkin, and he'll be shown a great deal of deference. And they asked me about that, and they asked, "What do you mean by that?" And I

wasn't, kind of, sure what -- where they were going with that. But -- let's see. There --

MR. FOSTER: Was shown a great deal of deference by whom?

MR. RIBELIN: Deference.

MR. FOSTER: Were you saying that SEC management would show them a great deal of deference?

MR. RIBELIN: Yeah. I think I -- I can't remember exactly what I said, but my -- I guess my thought was, you know, he obviously carries weight, you know, just as any former Director, Commissioner, or Chairman might relative to others. So, to be mindful of that.

MS. MIDDLETON: I just want to understand. They showed you an e-mail in which you made that statement or Gary made that statement?

MR. RIBELIN: Yeah. Where I made the statement that Gary Lynch, you know, investigated this back in the '80s and he -- and I don't think I said in the e-mail, but it should have been implicit, that he's a former Director of Division of Enforcement and, therefore, might be shown some deference, or will be shown deference, I think I said.

MS. MIDDLETON: So the IG showed you that e-mail. Did they show you other e-mails that you can

remember?

MR. RIBELIN: They showed me an e-mail in which Gary said -- Gary basically said that he's leaving. This -- and this must have been when he gave that final resignation.

And I said something to the effect, "It's been a pleasure working with you, you're a real pro." Something to the effect, "I know you're wired differently. I tried to assuage you, to help you get through these difficult times with whatever bureaucracy and other road blocks there might be that were involved in the process," and something to the effect, "I understand I couldn't overcome that. Good luck."

And I think they asked what I meant by that. It's self-explanatory. But I know there were a couple of times he was incredibly frustrated and he -- there was -- there was tension throughout the process for months and months and months.

There were a lot of guys who were pretty aggressive, pretty emotional, pretty -- various guys who were temperamental at different times, I think, including Mark, and Gary, and myself, and Berger. And there was just always tension and always frustration, and always an attempt to get through it. And I think Gary was used to going, you know, at his pace, which was full steam all

the time.

And I understand the culture is, that's not what it is. I mean -- and so my hope was that I would be able to explain to him, notwithstanding the frustrations, try to gear back if you can and work through it, and we'll ultimately get through it. We'll be able to do this investigation. There will necessarily be road blocks that are just a matter of the culture of any kind of organization, and we've got to deal with it.

But then there were these other road blocks that were not part and parcel of what you would expect, and those were the things ultimately that I think he had a difficult time accepting. So I -- so, at any rate, I talked to them about that e-mail, and then there may have been one other one.

MS. MIDDLETON: Do you remember what the other one is?

MR. RIBELIN: There was an e-mail that was completely nonsensical, an e-mail that I think I sent that had a word at the beginning of a phrase that was in small cap, and then there was either a comma or period, and then there was a sentence or a phrase that followed, and it was completely nonsensical.

I mean, it's as though I wrote it after, you know, not sleeping for 48 hours. I said, "I don't know

what this is." And Mary Beth said, "Well, it's obviously out of context. It's hard to figure it out." That was the other one.

MS. MIDDLETON: Did they give you these documents? Did you keep them or walk away with them, or --

MR. RIBELIN: No.

MS. MIDDLETON: They showed them to you and took them back?

MR. RIBELIN: Yes. Yes.

MS. MIDDLETON: Did you talk to them again after that?

MR. RIBELIN: No.

MR. FOSTER: Have you been asked for documents from them since then?

MR. RIBELIN: The only documents I've been asked for are pursuant to your request that went through the GC's office, and I've turned those over.

MR. FOSTER: About how much did you turn over?

MR. RIBELIN: I turned over a Redwell maybe an inch-and-a-half thick.

MR. FOSTER: And what kinds of documents were in it?

MR. RIBELIN: There was a memo that was authored by myself to Tom Conroy and Craig Miller

concerning possible manipulation. There were 10 or 15 copies of notes that I took in the course of the investigation, just various and sundry odd other documents.

MR. FOSTER: And written notes?

MR. RIBELIN: Yes. And written notes. Yeah.

MS. MIDDLETON: And when did you give those to the GC's office?

MR. RIBELIN: Either a week ago today, or two weeks ago today.

MR. FOSTER: Do you have a sense of the reputation of the IG's office within SEC? Is it a place that employees feel comfortable going and reporting waste, fraud and abuse?

MR. RIBELIN: I don't have a sense.

MR. KIM: Do you have any reason to believe that the IG's office is not independent from influence from Commissioners or from the General Counsel's Office?

MR. RIBELIN: Well, I don't, other than, I guess, it's surprising that I wasn't spoken to about this firing.

MR. FOSTER: How did you feel when you learned that?

MR. RIBELIN: That I was not spoken to?

MR. FOSTER: Right. That you learned that they

had done an investigation and that you hadn't been one of the people that had been asked about it, given how much time you spent on it?

MR. RIBELIN: Well, frankly, I had two feelings. One, was I was surprised, because I would think that they would want to talk to me. And to be very honest, I was happy because I just wanted it to -- I just didn't want any more involvement in any way, shape, or form, you know. So --

MR. KIM: That's a fair answer.

MR. FOSTER: I understand.

MR. KEMERER: We have read press accounts in the last month or so that the SEC has taken John Mack's, either testimony, or has interviewed him. Have you read about that?

MR. RIBELIN: I have read the press accounts.

MR. KEMERER: Do you know them to be true, independent of what's in the press?

MR. RIBELIN: I believe he's been interviewed or his testimony has been taken.

MR. KEMERER: A cynic might look at the, sort of, timing of that and say, well, the public announcement in GE-Heller was July 30, 2001, and the Mack interview didn't occur until after July 30, 2006, if what is stated in the press is true.

Did you have any observations about the timing of the Mack interview?

MR. RIBELIN: I think the -- I think what I read was that they -- two things happened. There was an announcement that there was going to be reopening of the IG report and that the testimony was going to be taken, so my observation was that it occurred at the same time. And by the way, I have had very little involvement with -- as I indicated earlier today, in the case in any kind of a direct way for a long time.

MR. KEMERER: Is that despite what Joe Cella said, that you really didn't have much choice? You still don't work on that much?

MR. RIBELIN: Well --

MR. KEMERER: When did that change?

MR. RIBELIN: That was in September or so of last year. And we worked pretty diligently through the autumn and early winter on the memo, on the manipulation aspect of the case.

Since then, December-January of this year, my involvement has been greatly reduced and it's been Steven Glascow, working a little bit with Jim Eichner on the insider trading side, that has continued to work on it.

MR. KEMERER: We talked about recusal and the Ethics Office. Did there come any time in the course of

the Pequot investigation while you were still working on it, let's say between Mr. Aguirre leaving in September and you not really working on it much after January of this year, did there come any time when Berger recused himself from it?

MR. RIBELIN: I don't know. Not to my knowledge. I don't know, though.

MR. KEMERER: Would you have known? I mean --

MR. RIBELIN: I would not necessarily have known if he had.

MR. KEMERER: Okay. That's all I have.

MR. FOSTER: Other than the previous instances that you've already discussed today, do you recall any other times in which people at the SEC discussed someone's political connections, or political clout, or influence, or stature, or anything to that effect as a reason --

MR. KEMERER: Prominence.

MR. FOSTER: Prominence. Thank you. As a reason for not taking their testimony, or not taking their testimony until a great deal had been established about them?

MR. RIBELIN: No, I don't recall any.

MR. PODSIADLY: Well, I think at this point, I mean, that's all the questions I have.

Do you have anything you want to ask of us?

MR. FOSTER: Is there anything that we haven't asked you about that you think we should know that's relevant? Let me rephrase that. Is there anything that we haven't asked you about that you think we might think we would want to know that is relevant?

MR. RIBELIN: I can't think of anything offhand. I'm a bit tired, frankly.

MR. FOSTER: So am I.

MR. KIM: Well, Mr. Ribelin, again, thank you.

MR. FOSTER: If you do think of anything relevant, please don't hesitate to contact us.

MS. COBB: We're happy to step out.

MR. FOSTER: Actually, I wanted to ask, we didn't get to talk about your education at all, but obviously you have sort of sophisticated knowledge of the securities markets. Tell us a little bit about your post-high school education.

MR. RIBELIN: I have a Bachelor and Master's degree from Eastern Illinois University. I taught there for one year in the Economics program. I then went into the doctoral program at Indiana in Economics, and I spent a year in the program and I taught for a year. I then left the program in '86 and moved to Los Angeles, and worked in a brokerage firm for two years. In '88, moved

to DC, and I've been with the SEC since.

MR. FOSTER: Okay.

MR. KEMERER: And I think they were just going to offer to leave. Did you feel the need, or do you want to tell us anything in their absence?

MR. RIBELIN: No. I think I may hang around and chat, but I don't think there's anything else.

MR. KEMERER: Excellent.

MR. FOSTER: Thank you very much.

MR. PODSIADLY: In closing, we will ask that you try to keep what was said in the room here to yourself until all the witnesses have been interviewed, just so there's no cross-contamination story.

MR. RIBELIN: Absolutely. I'll do that.

MR. PODSIADLY: Thank you. Appreciate you coming in.

MR. FOSTER: Thank you. Appreciate your time.

MR. RIBELIN: Thanks.

(Whereupon, at 5:31 p.m. the interview was concluded.)

C E R T I F I C A T E

This is to certify that the foregoing proceedings of an interview of Eric Ribelin, in the matter of Trading in Certain Securities, No. Ho-9818, and the SEC's Termination of Employment of Gary Aguirre, held on Friday, September 1, 2006, were transcribed as herein appears, and this is the original of transcript thereof.

LISA DENNIS

Certified Verbatim Reporter

1

C O R R E C T I O N S

WITNESS: Eric J. Ribelin

CASE: Trading in Certain Securities, No. Ho-9818, and the SEC's Termination of Employment of Gary Aguirre

Please note any errors and the corrections thereof on this errata sheet. The rules require a reason for any change or correction. It may be general, such as "To correct stenographic error," or "To clarify the record," or "To conform with the facts."

PAGE	LINE	CORRECTION	REASON FOR CHANGE

Eric Dinallo Morgan Stanley
urgent message

Bob Craig

ED – obviously need papers; brief on top of papers
– If Mack is being investigated he understands
– Board to be days away
– Don't want to distract or knock off his tracks

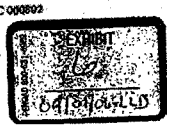
MK – Mack wants to come back?

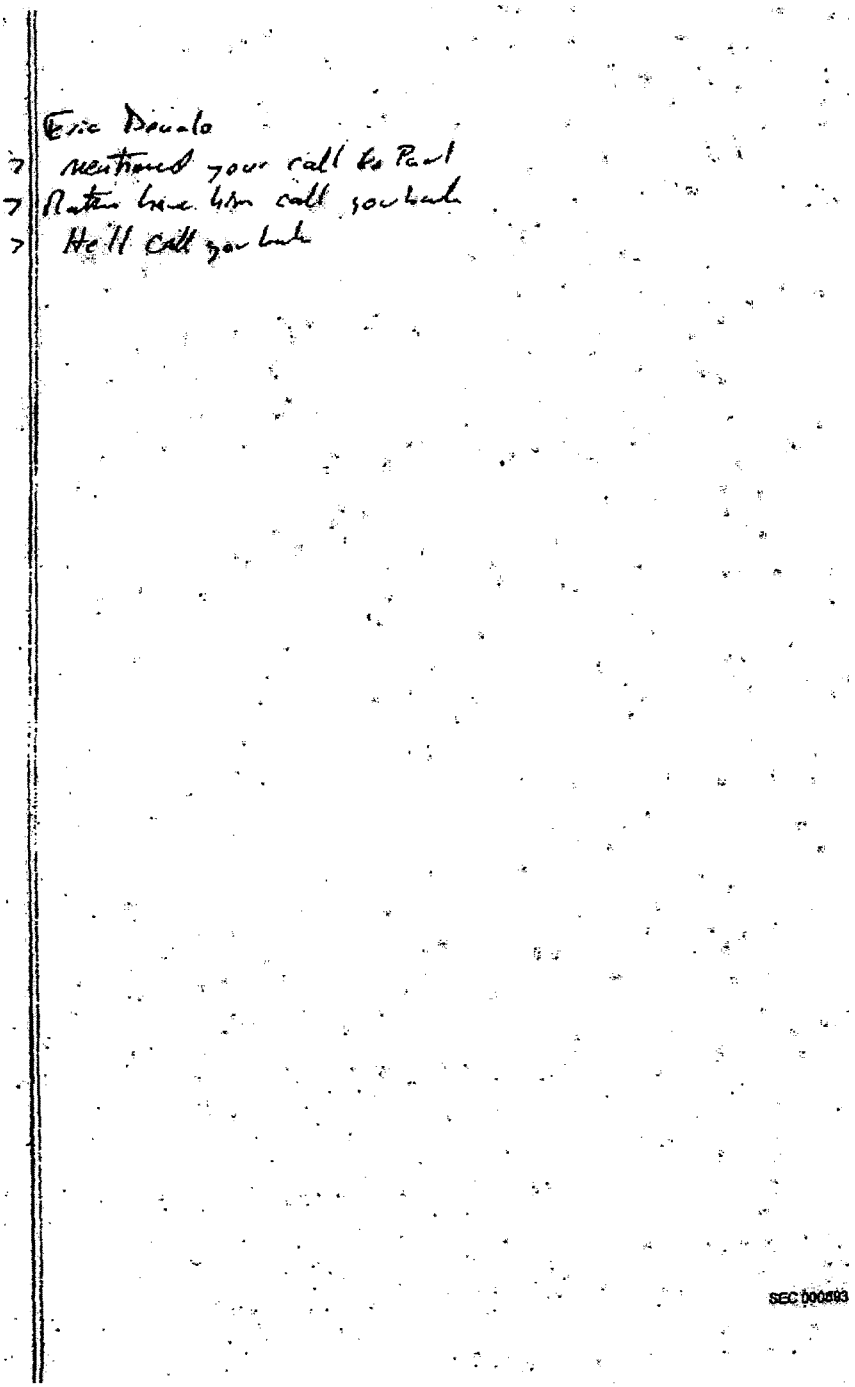
ED – Real possibility that he would come back
– know you can't tell me why Mack back but it is
– logical hard to discuss investigation but it is
– he is a target of investigation
– don't think we should
– don't know whether it is a shot in dark

MK – Eric, perfectly reasonable request, we don't have target investigation in early stages – don't know what will

ED – implied you had other sources of evidence
– don't want to brief
– if focused on him with official his evidence
– government has responsibility to ...
– I need to know it just because he was on CNBC

MK – Let call back




Eric Dowdle
> mentioned your call to Paul
> Rather have him call you back
> He'll call you back

SEC 000893

7 If Eric wants to talk give me a call

- Tell Eric that I'll call him back

From: Aguirre, Gary J.
Sent: Tuesday, July 19, 2005 12:00 PM
To: Kreitman, Mark J.; Hanson, Robert
Cc: Ribelin, Eric; Eichner, Jim; Jama, Liban A.
Subject: Lynch

Lynch will thus be in a position to have orchestrated the document production from both CSFB and Morgan Stanley relating to Mack. Having access to our CSFB and Morgan Stanley subpoenas, he should understand exactly where we are going.

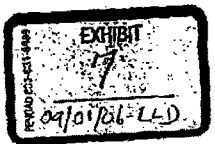
Per earlier discussions, Lynch seemed to have an agenda that did not relate to my discussions with Patalino. I suspect Patlino is also leaving with Lynch (as he did from Davis Polk when Lynch Left) for Morgan Stanley. He turned the matter over to someone last week, saying he would be staying at home this week.

This puts in perspective brief call from Ashley Wall (Morgan Stanley counsel) on Friday, when she called to say there would be no more Mack e-mails. A week before she told me that they were still working on producing some additional e-mails relating to Mack and would be searching backup tapes. Her tone on Friday, which is usually fairly light, seemed strained. I asked her how she already knew that there would be no Mack e-mails in backup tapes, but her answer made no sense. She agreed to explain the reason in a letter. This was a mild red flag, but I did not make much of it because MS has been very cooperative until now.

Here's the language from our current subpoena:

1. All electronic mail sent to John J. Mack ("Mack"), or any of his secretaries, assistants, or others acting on his behalf, from January 1, 2001, through March 31, 2001, from Arthur J Samberg ("Samberg"), or from any agent, officer or employee of Pequot Capital Management ("PCM");
2. All electronic mail from Mack, or any of his secretaries, assistants, or others acting on his behalf, from January 1, 2001, through March 31, 2001 to Samberg, or to any agent, officer or employee of PCM;
3. All electronic mail sent to Mack, or any of his secretaries, assistants, or others acting on his behalf, from March 1, 2001, through August 30, 2001, from any agent, officer or employee of MS; and
4. All electronic mail from Mack, or any of his secretaries, assistants, or others acting on his behalf, from March 1, 2001, through August 30, 2001 to any agent, officer or employee of MS.

I suggest another call to Ashley tomorrow or Thursday with Liban, Jim, or both to pin down exactly the situation on the Mack e-mail subpoena.



Ribelin #1

Unknown

From: Hanson, Robert
Sent: Thursday, August 04, 2005 11:01 PM
To: Ribelin, Eric
Subject: Re: Does 3 today work? If so we'll come up to see you Eric

Geez eric have I offended you in some way? I think the things we discussed today were reasonable not the opposite--especially considring that jim and I are far behing and still learning. I sensed that you were unhappy in the meeting today and I'm not sure exactly why. If you think there are issues we should address (including the oddities you mention) I'm happy to talk about them with you or anyone else. I''m very concerned that you feel there are considerations or discussions going on behind the scenes. Do you know something I don't?

Eric, I look forward to continuing to work with your team on this exciting project. Again you may need to be a little patient with us until we get a better handle on the facts and I apologize for that in advance. In the meantime, I'm always open to suggestions and ideas on ways to do my job better, and move the investigation along while keeping everyone motivated and happy.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Ribelin, Eric [redacted]
To: Hanson, Robert [redacted]
Sent: Thu Aug 04 21:33:20 2005
Subject: Re: Does 3 today work? If so we'll come up to see you Eric

Bob, I have to tell you I was nonplussed today about the suggestion that we hold off on going to cl kfng. We had already discussed and agreed upon a plan of action (to send out all subpoenas simultaneously) and now the thought that we should go first to pequot, and essentially determine whether a sufficient reason exists to go to the other players, does not comport with how we usually do business (this is especially true given the documents on their face point to wash sales). In fact, I have been troubled by a number of oddities about decisions made on both sides (insider trading and stock manipulation) of this investigation. In the end I felt I needed to make a strong plee that we stick with the original plan (and to your credit you agreed), but the continued twists and turns that seem to be always put in the road are beginning to effect staff morale. if anything is effecting major decisions that I'm not made aware of, then it will obviously leave me wondering what is really happening. I ask you therefore, to apprise me of ANY behind the scene discussions and/or considerations. I DON'T want to play politics, but I do want to do my job in a straightforward manner and absent intrigue. Thanks. Eric.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Ribelin, Eric [redacted]
To: Hanson, Robert [redacted]
Sent: Thu Aug 04 08:14:28 2005
Subject: Re: Does 3 today work? If so we'll come up to see you Eric

3 is fine.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Hanson, Robert [redacted]
To: Ribelin, Eric [redacted]; Bichner, Jim [redacted]
Sent: Thu Aug 04 07:52:03 2005
Subject: Does 3 today work? If so we'll come up to see you Eric

EXHIBIT 09/01/06 [redacted]

Unknown

From:	Hanson, Robert
Sent:	Friday, September 09, 2005 12:13 PM
To:	Ribelin, Eric
Subject:	RE: Pequot

Sorry you feel this way. I know you have put a great deal of productive time and energy into the case.

-----Original Message-----
From: Ribelin, Eric
Sent: Thursday, September 08, 2005 10:52 PM
To: Hanson, Robert
Subject: Re: Pequot

Bob, I have serious misgivings about many decisions made in this investigation. I don't know what all has driven the decisions. Something smells rotten, though. (I'm accusing you of nothing). You seem like a good guy and you've certainly a good soldier, but I'm nonplussed by issues big and small about the course of events going back to january. I really do need to contemplate my involvement going forward.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Hanson, Robert [redacted]
To: Ribelin, Eric [redacted]
Sent: Thu Sep 08 22:26:07 2005
Subject: Re: Pequot

Does it make sense to meet to discuss or to meet with joe and mark? Or some combination? You don't seem happy and I'd like to try to work out issues that to me are so non-controversial. I'm willing to do what it takes.

Sent from my BlackBerry Wireless Handheld

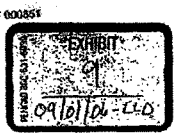
-----Original Message-----
From: Ribelin, Eric [redacted]
To: Hanson, Robert
Sent: Thu Sep 08 21:17:35 2005
Subject: Re: Pequot

Bob, gary has been over this territory with you guys countless times before. Why are you so fixated on whether the size of the trade is aberrational? the circumstances that are germane have been articulated: trade by samberg alone, no consultation with anyone at pequot, no research done but for a few sell side reports produced by his counsel as his basis (notwithstanding in his own words multiple times that wall st research "isn't worth a damn," selling about the acquiring company just before the announcement, etc. Etc. You guys have to STOP thinking that the size of a trade vis a vis the past is the only circumstance worth considering. These guys are smart, unlike one time inside trader who opens acct, trade options for first time and makes killing. That's not the paradigm we can go by. This is different. They are different!!!!!!!!!!

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Hanson, Robert [redacted]
To: Ribelin, Eric [redacted]
Sent: Thu Sep 08 20:06:54 2005
Subject: Re: Pequot

SEC 000851



I had not known that pequot typically made 30 to 40 million dollar bets on stocks until your e-mail below. Your view makes sense and it doesn't make sense to conduct a multi-month exercise to determine what we know. You are also absolutely right that it is important to look at all the surrounding circumstances of the trade. It just makes it more difficult to prove a circumstantial case if the trades were consistent with pequot's past practices. If they weren't consistent with past practices, of course, samberg's credibility would also be further undermined.

I'd like to see craig's analysis if it's handy. I haven't located any more memos from gary but I'll check with mark and the others. Let me know if you come up with anything on that front.

Thanks,

Bob

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Ribelin, Eric [redacted]
To: Hanson, Robert [redacted]
CC: Kreitman, Mark J. [redacted] Calla, Joseph J. [redacted]
Sent: Thu Sep 08 15:25:02 2005
Subject: RE: Pequot

They are a multi-billion dollar hedge fund. We have, I don't know, 20,000+ pages of trading over a four year period. If the question is whether they've made similar size trades in other companies I'm sure the answer is likely that they have. If the answer is "yes" is it exculpatory? Who do you want to go through all the trading to determine this? Do you want a list of all such trades? It will take weeks, or months, or more, to get the answer. Then, for this exercise to really be meaningful (assuming it's meaningful to begin with), it will require in-depth analysis. As it relates to whether the trade is unusual, look at everything surrounding the trade - not solely the size of the trade. That Samberg said there was nothing unusual about the Heller trades is as predictable as the sun setting tonight in the Western sky.

The July '01 trades were the first trades in Heller. Craig Miller completed an analysis of trading, at Gary's request, in the common stock of GE. It should be in Gary's files. I can have Craig get you the spreadsheet if you would like.

If there are any other memos written by Gary that are germane to these issues, if you would forward them on I'd be appreciative. I'd like very much not to redo what has already been accomplished. I'm sure you feel the same. That said, I understand the need to get your arms around what's in-house. Gary put in 60-hour work weeks for just under one year. There is much information to absorb.

Thanks, Eric.

From: Hanson, Robert
Sent: Thursday, September 08, 2005 2:06 PM

To: Ribelin, Eric
Cc: Kreitman, Mark J.; Cella, Joseph J.; Jana, Liban A.; Richner, Jim
Subject: Pequot

Just for context, since neither Mark nor Joe have the draft to do list for Pequot, I've attached it. Jim, Liban and I met this morning to talk about the logical steps to take for the three of us to take during the next week -- basically we concluded that we needed first to get our arms around what we have in house and what is still outstanding in terms of document production. As I mentioned to you I'd like to start meeting every week to discuss where we are going, what has been done, develop priorities, brainstorm, etc. The to do list is a first cut at doing that.

By aberrational trading, I'm referring to whether Pequot traded in GE and Heller at other times and whether he made similar sized trades, or bets, with other companies. Samberg claimed in testimony -- in essence --- that the Heller trading was not so unusual. My recollection is that we don't have an answer to that question in Gary's memos. We will, of course, use Gary's memos to build on and below I've cut and pasted an e-mail from Gary below on Mack's testimony. There was at least one earlier e-mail that you were copied on also Eric and I will forward that to you in case you don't still have it. If there are other useful memos, please pass them on.

Thanks,

Bob

Bob:

You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost very element and is inconsistent with none. Second, whether or not Mack is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper.

Mack meets each element of the profile.

The timing of the trading with Mack's access to possible information

The first element is whether Mack had possible access to information that GE would make a tender offer for HF. He had access from two sources: he had been the CEO of Morgan Stanley, who advised GE, until late March. He also took over as CSFB's CEO on July 12, 2001. Samberg's trading pattern, which I can discuss in more detail if you want, suggests that he obtained information just before Monday July 2, around July 9, and around July 25. Mack coincidentally met with CSFB's CFO on June 28 or June 29, again a few days before he began work on July 12, and was CEO at the third key time. Hence, Mack had relevant

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contacts with CSFB at each time. Also, CSFB was "wooing" Mack away from Merrill Lynch and other investment banking firms during the period from April through July 2001. It would be consistent with this effort for someone at CSFB or GS to mention, as part of this wooing process, what inventory Mack would be taking over. Incidentally, we know how Samberg saw Mack's new role as CEO of CSFB. He and his son discussed the fact that CSFB was the second largest investment banker at that time and "it was good to have friends in high places." Of course, there is also the possibility that Mack, through his contacts at Morgan Stanley, knew about the pending GE tender offer.

Questioning Mack about this transaction could take us in several directions, each of which suggests a different focus for the investigation. First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true. Second, Mack might say he learned on June 28 or June 29. The focus would then be placed on his contacts with Samberg at that time and whether he learned that GE had bumped its offer around July 9. Finally, he might give convincing testimony that he learned after July 12 for the first time and cause us to reevaluate whether his should even be considered.

Also, Samberg's trading suggests that he did not get the tip until shortly before he started trading. He would not be the largest purchaser of HP during July if he had the tip before. It also makes sense that his tipper, likely someone he trusted, got the tip just before Samberg started trading. Had the tipper had it earlier, why would he have not communicated it earlier? Further, GE made its first offer in early June. It would make sense for Samberg to start buying then if he knew about the trade. The Mack-CSFB meeting on June 28 or June 29 and the Samberg huge trading the next week fits.

Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he he spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Converbely, he might tell us that he was seeing some of the people on the acquisition team as Morgan Stanley at this time. That would take the investigation in a completely different direction.

Mack had the motive to tip Samberg

Mack had multiple reasons for tipping Samberg about the GE tender offer for Heller.

a) Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001. Mack was getting into private deals that Pequot was putting together for its own principals, including projects with the following code names: $5 million into "Fresh-start" (Lucent spin-off bought cheap), $2 million into Baby C, and an unknown amount into Distressed Guys, which later became Pequot Special Opportunities Fund. The most interesting situation involved Fresh Start. Mack was pressing to get into this for sometime. On June 20, a Samberg e-mail said that he was with Mack and that Mack was "busting his chops" Samberg's chops because he had not got the documents on this investment. Neither the Pequot principals nor Samberg's son seemed happy about Mack getting into this Fresh Start. During the call on June 29, when the suspected tip occurred, Samberg arranged for Mack to get into Fresh Start. Mack also was getting into Pequot funds when they appear to be closed. At that time, Samberg's funds were doubling in value in less than 3 years and the Pequot Scout fund was doing even better. In general, the funds had a $5 million lower limit. E-mails show Mack putting at least $13 million into these funds. One of the spread sheets I provided to Mark on June 29 shows Mack invested in 15 different Pequot funds (but it does not show when). As a rough estimate, based on performance over 1999 and 2000, Mack could reasonable expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) Board seats As shown on one of the spreadsheets, Samberg was promoting Mack for

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board seats on both Baby C and Fresh-start.

c) Office Space Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.

d) Stock tips Samberg was giving Mack stock tips on public companies that Mack directly invested in. "That's where were putting our money."

e) Friendship Mack and Samberg were close friends. Two months ago, Mack took over as CEO at Pequot. That Samberg would choose Mack in the middle of an investigation that could land Mack in jail tells much about the level of trust Samberg had in Mack. I discussed how the friendship played as a motive in my June 27 memo.

f) Mack's crossing the line for Pequot. While Mack was at CSFB, he was acting as Pequot's agent to introduce one of the companies Pequot co-owned with Lucent, to an investment banker in China. Mack's letter, written on behalf of Pequot reads, "I have not given this first to CSFB (where he was then CEO) or to Morgan Stanley because I think your contacts in China are the best."

Samberg had a relationship of trust deep friendship with Mack.

We do not have a complete picture of Mack's financial assets, but his holdings in his Pequot funds in 2001 exceeded $400 million. He holds an engineering degree from MIT, a Masters of Science from Stanford, and an MBA from Columbia. He started with $3.5 millions and built the largest hedge fund in the world as of 2001, when the GE-HF trading took place. He has generally been very careful about his comments in his e-mails. He used AOL instant messaging, which leaves no trace in any computer, to communicate with key people. In short, he's a smart guy who took few chances. It does not fit the pattern for him to be taking big chances where he got his tip. It makes sense that he got it from someone he trusted and who also trusted him. That was Mack. Mack's e-mails to and from Samberg have a different ring about them. In one e-mail, Samberg's secretary tells Samberg Mack had called and that, "he loves you." In sum, there was a deep trust and friendship between them. It is exactly the kind of relationship that Samberg would feel comfortable calling on for a tip as big as HF and GE.

Samberg's need for a big favor from an old friend.

In July 2001, Samberg's company was splitting a part. Benton was a younger and a rising star. Benton's performance was dwarfing Samberg's. Samberg was recovering from heart surgery. Benton was leaving with at least half the company. Samberg was looking at even bigger staff losses to Benton. He testified that he was concerned at this time that more of his executive committee "might walk." A big hit on GE-HF would illustrate that his fast ball had not slowed. Regarding GE-HF, Mack was just the guy to do his old friend a big favor, one that would also benefit him.

Regarding Samberg's situation during this time frame, he testified at the first session:

The company was about to split, it was about to split. In September '00, I had an aortic medical situation and was near death. I was on heavy medication, and I was trying to reestablish the franchise value of Pequot and the core funds. I was actively looking for help, and I did things in a manner that was expedient at the time given my expertise in this area.

In a similar vein, he testified at the second session:

> My firm was going to split in three months. These people were my other managing director partners. Times were fragile. I needed their approval to do whatever I wanted.. to do or they might walk (emphasis added).

There do not appear to be other leads in the Sambery e-mails.

The evidence does not merely point to Mack. It points to no one else. I have been through the Sambery e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate. Further, Fried Frank has stated that Sambery made the decisions alone. No one was listed with him on the Fried Frank lists of those participating in investment decisions. If we don't take a look at Mack, we start all over again looking for someone that fits the profile. Then the question would remain: if we find him or her, will there be a similar reason for not proceeding with the examination? Very possibly yes, given Sambery's circles.

From: Ribelin, Eric
Sent: Thursday, September 08, 2005 12:04 PM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Cella, Joseph J.
Subject:

Bob, the outline you just sent me has in the section "General Electric/Heller" an item in reference to preparing a memo outlining items discussed with Mark addressing "aberrational trading?" What does that mean? In preparing a memo for Mark, are you, Jim and Liban reviewing the several memos I understand were sent to you and Mark by Gary? If you have those memos could I see them? Thanks.

Mark, I'll copy you on these communications so Bob won't have to forward my emails to you.

Williams, Betty J.

From: West, Lawrence
Sent: Monday, August 01, 2005 6:07 PM
T : Berger, Paul
Subject: Re: Your voicemaill

Ok

-----Original Message-----
From: Berger, Paul <[redacted]>
To: West, Lawrence <[redacted]>
Sent: Mon Aug 01 18:06:41 2005
Subject: Re: Your voicemaill

I'll talk to you tomorrow -- personnel issue.

Paul

Paul R. Berger
Division of Enforcement
Securities and Exchange Commission

-----Original Message-----
From: West, Lawrence [redacted]
To: Berger, Paul <[redacted]>
Sent: Mon Aug 01 18:05:14 2005
Subject: Your voicemaill

I just rang. You didn't pick up--I presume you've left for the day. What's up?
Larry. [redacted]

Williams, Betty J.

From: Markel, Susan
Sent: Monday, August 01, 2005 2:51 PM
To: Berger, Paul
Subject: RE: Merit Pay

I will call you when I am done with this call.

From: Berger, Paul
Sent: Monday, August 01, 2005 2:49 PM
To: Markel, Susan
Subject: RE: Merit Pay

Not a typo. We should talk.

From: Markel, Susan
Sent: Monday, August 01, 2005 2:48 PM
To: Berger, Paul
Subject: RE: Merit Pay

I am on a conference call, but unless it is a typo, you may want to circulate it to all of the Comp Committee and Linda and see if anyone has a problem with making the change.

Thanks.

From: Berger, Paul
Sent: Monday, August 01, 2005 2:28 PM
To: Markel, Susan
Subject: Merit Pay

Susan,

I need to make another change on the merit pay schedule. Call me when you have a chance. Thanks.

Paul

Williams, Betty J.

From: Kreitman, Mark J.
Sent: Monday, August 01, 2005 6:18 PM
To: Berger, Paul
Subject: Supplemental Evaluations

Attachments: Supplemental Evaluations 2.doc

Paul – My draft, Bob's comments included. Will have Dave's, if any, tomorrow morning. Mark

Supplemental Evaluations 2.doc...

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Supplemental Evaluations:

Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. He is willing to go the extra mile. But he is resistant to supervision and insufficiently aware of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he issued required retraction to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counselHis desire to maintain complete control of his investigation seems to preclude full and open sharing of information with others. He has difficulty explaining the significance of evidence his investigation uncovered in a clear and well-organized manner and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Swanson: Rob puts in long hours, takes advantage of expertise available throughout the Commission, and develops creative investigative models. He has excellent analytical skills. He has difficulty, however, working within a structured organizational framework and fails adequately to solicit his supervisors with respect to tactical and strategic decisions. For example, he has dispatched subpoenas without first clearing them with his branch chief, and taken legal positions without full consideration of conflicting decisions. Often he seems to focus on his personal interest in aspects of his investigations rather than soliciting others' input to ensure shared understanding of priorities and concerns.

William , Betty J.

From: Kreitman, Mark J.
Sent: Monday, August 01, 2005 5:26 PM
To: Berger, Paul
Subject: Bof Besse's Evaluation

Attachments: June 2005 Evaluation.doc

Paul – Am open to suggestion on this. Mark

June 2005
valuation.doc (34 K

Hardy, M linda

From: Ribelin, Eric
S nt: Friday, February 25, 2005 11:29 AM
To: Fay, James
Subject: RE: MHO -9818 -- email production

You know Hamlet never rested. He was a one-man wrecking machine.

-----Original Message-----
From: Fay, James
Sent: Friday, February 25, 2005 11:25 AM
To: Ribelin, Eric
Subject: RE: MHO -9818 -- email production

I have faith that you will stay the course, but let me say this: I have seen these enf. Lawyers get all huffy before. They are empty suits. When push comes to shove, no one in the SEC is going to take on FF or any other major player. Not going to happen. Witness the touchy feely "conference" you are going to have next week. When FF gets a handle on the email, they will produce them, and not before...sorry, not what you want to hear...

-----Original Message-----
From: Ribelin, Eric
Sent: Friday, February 25, 2005 11:22 AM
To: Fay, James
Subject: RE: MHO -9818 -- email production

I will continue to be outraged and I will be heard. Meanwhile, this investigation ain't going away.

-----Original Message-----
From: Fay, James
Sent: Friday, February 25, 2005 11:19 AM
To: Ribelin, Eric
Subject: RE: MHO -9818 -- email production

I think you are dead on; That FF doesn't realize that they are supposed to search back up tapes? That is absurd. Anyone from FF who actually says that should be the subject of a criminal referral. These guys are the most sophisticated guys around. Back up tapes? That is like not knowing that you have to search your garage...and we are letting them get away with it.

-----Original Message-----
From: Ribelin, Eric
Sent: Friday, February 25, 2005 11:10 AM
To: Fay, James
Subject: RE: MHO -9818 -- email production

3 or more former employees of Broadcourt are at Pequot. Direct line of info perhaps. What do you think about "it's a lie. And we're the ones being lied to?" We need to start whacking these hacks with 102(e). That'll stop the obstruction.

-----Original Message-----
From: Fay, James
Sent: Friday, February 25, 2005 10:57 AM
To: Ribelin, Eric
Subject: RE: MHO -9818 -- email production

I am not so sure I followed the K&L guy's email. They don't save email, unless they do? And there is 30K of Pequot email? Of course, depending on

how they search, there may be tremendous repetition. For exampl , if I have 3000 emails on my system today, and one year from now you ask for all my email. I would give you 3000 for Feb. 3000 plus the 100 added in March, 3100 plus the 100 added in April...see what I mean? I have no idea how many people are writing back and forth, but that is a lot of email!! Oh, Baby...

-----Original Message-----
From: Ribelin, Eric
Sent: Friday, February 25, 2005 10:00 AM
To: Fay, James
Subject: FW: MHO -9818 -- email production

-----Original Message-----
From: Ribelin, Eric
Sent: Friday, February 25, 2005 9:56 AM
To: Aguirre, Gary J.; Hanson, Robert; Foster, Hilton
Cc: Kreitman, Mark J.
Subject: RE: MHO -9818 -- email production

"Privilege" is a red herring. It's a lie. And we're the ones being lied to.

-
From: Aguirre, Gary J.
Sent: Friday, February 25, 2005 5:59 AM
To: Hanson, Robert; Ribelin, Eric; Foster, Hilton
Cc: Kreitman, Mark J.
Subject: FW: MHO -9818 -- email production

Is there another reason Pequot has straight armed our efforts to get its e-mails and schedule exams to the point it appears to accept the risks of Commission proceeding? Is Pequot waiting to get the 31,000 Pequot-Broadview-Jeffries e-mails from Jeffries so they can be considered before exams proceed? I thinks so. I suspect that Pequot-Fried Frank thought these e-mails were going to stay buried.

At the risk of being repetitive, having 31,000 Pequot e-mails pop up is startling. That's something like 80 e-amails a day between Pequot, Broadview and Jeffries. These e-mails are all before the splash about e-mails in 2003.

For those that don't recall the history, Broadview, a B-d, was the adviser to Elite when it was acquired by the Thomson Company. Broadview itself was later acquired by Jeffries. I have always believed the Elite acquisition, all facts considered, is the strongest SRO referral. It was the first matter discussed in the formal action memo. Jeffries-Broadview are now represented by Kirkpatrick-Lockhart (Eilleen Clavere). A number of Broadview graduates are now with Pequot, including both Lenihan and Rossman (suspected tippee) whose exams are scheduled for April.

Rossman has frequent meetings with Broadview and for sure knows what's going on with the case. I have also believe Clavere is coordinating the Broadview defense with Audrey.

Both Jeffries and Pequot have been playing the "I didn't know you wanted us pull e-mails from backup tapes game." Jeffries also claimed until this week that it had no incoming e-mails and thus no Pequot incoming e-mails. The Jeffries version of the game ended when we included the backup tapes in our recent subpoena and began asking who the compliance officer was for the period in question. Clavere asked me several times whether I really wanted the backup tapes. Each time I said yes unless she convinces me that we have everything.

Pequot must be petrified by Broadview's breaking ranks and producing 31,000 Pequot-Broadview e-mails to us. The e-mails Jeffries produces may include some

of the Pequot "double deletes." I would also assume that Pequot or Fried-Frank has made arrangements to get them or already has them.

In the e-mail below (sent yesterday), Kirkpatrick-Lockhart is trying to buy some mor time to restore the e-mails. This is also the first time they reveal to us the existence of the 31,000 Pequot e-mails they're holding. Is it appropriate to ask Clavere if she has any reason to believe her client is providing or intends to provide the 31, 000 e-mails to Pequot? If this is going on, it is more likely being done under the cover of "privilege," like the one Pequot is asserting in connection with its own e-mails. The review by Fried-Frank of the Broadview e-mails would be privileged, but not the delivery of the e-mails by Kirkpatrick or Jeffries-Broadvew to Fried-Frank.

Gary

-----Original Message-----
From: Guo, Xinxin
To: Aguirre, Gary J.
Cc: Clavere, Eilleen
Sent: 2/23/2005 9:43 PM
Subject: MHO -9818 -- email production

Dear Mr. Aguirre,

I'm sending out a box of documents and 1 CD to you via FedEx tonight. I wanted to give you a status report on Jefferies' email search efforts and would like to request an extension of the February 24th document production deadline accordingly.

As you are aware that prior to December 1, 2003, as a matter of its email retention policy, Broadview did not retain any incoming and internal emails of its employees. Consequently the incoming and internal emails during the specified periods were not archived, However, as we later found out, certain incoming and internal emails may have been saved under certain circumstances. For example, if a Broadview employee had saved the incoming or internal emails in his or her mailfile, then such emails can be retrieved. However, this search of individual employee mailfile is very labor intensive and time consuming. As of today, Jefferies IT staff has performed the following searches:

#1 - Searching all officially archived emails from 01/01/2002 through 06/30/2003 for select keywords:

* For "pequot" OR "pequotcap.com" OR "pcm" there were 31,159 emails that were returned.
* For "elite" OR "elite.com" there were 40,997 emails that were returned.

Because Jefferies and Broadview share the same archive, J fferies IT staff is in the process of separating Broadview's emails from the search results.

#2 - Searching all Broadview mailfiles that still exist from 01/01/2002 through 06/30/2003 for select keywords:
This search was performed as follows:

* On the Broadview mail servers, an agent was run that went through every mailfile wher a person document existed and pulled a copy of any email still in their mailfile from 01/01/2002 through 06/30/2003 and put it in a s parate Notes database (mailsearchjan lle.nsf).
* On the Broadview mail servers, an agent was run that went through every mail-in database and pulled a copy of any email from 01/01/2002 through 06/30/2003 and put it in a separate Notes database (mailsearchjanelle2.nsf).
* On the Broadview mail servers, an agent was run that went through every orphaned database and other files, and pulled a copy of any email from 01/01/2002 through 06/30/2003 and put it in a separate Notes database (mailsearchjanelle4.nsf).
* The above 3 new databases were indexed and keywords searched.
* In the above 3 new databases, "pequot" OR "pequotcap.com" OR "pcm" were searched and the results placed in another database called BVMailsearchPequot. There were 509 emails found.
* In the above 3 new databases, "elite" OR "elite.com" were searched and the results placed in another database called BVMailsearchElite. There were 1,897 emails found.

#3 - Calendar Entry search found in Broadview Mailfiles:
This search was performed as follows:

* On the Broadview mail servers, an agent was run that went through every mailfile where a person document existed or an orphaned mailfile, and pulled a copy of any calendar entry still in their mailfile from 01/01/2002 through 06/30/2003 and put it in a separate Notes database (mailsearchjanelle3.nsf).
* The above database was indexed.
* All 51 names of Attachment A Non-Exclusive List of Pequot Employees was searched, and there were no calendar entries found for any of these people.
* Searches for "pequot" OR "pequotcap.com" OR "pcm" were performed. 5 calendar entries were found and placed in a folder on BVCalendar5. "elite" OR "elite.com" was also searched for and 49 calendar entries were found and placed in a different folder.

#4 - A search of all Jefferies' official archived emails for the individuals and timeframes specified in Exhibit C of the Subpoena.

#5 - A search of all the Broadview mailfiles for the individuals and timeframes specified in Exhibit C of the Subpoena.

On the Broadview mail servers, an agent was run that went through every mailfile where a person document existed and pulled a copy of any email still in their mailfile from 01/01/2002 through 06/30/2003 and put it in a separate Notes database (mailsearchjanelle.nsf).
This database was indexed.
A search was done for each person's name and it had to be present in any one of these fields - From; SendTo; BlindCopyTo; CopyTo; Recipients; Principal. Their last name was used as well as their internet email address.
Results of the search were placed in a new database called BVMailfileSearch5 with a folder for each person.

#6 - CD search of Kennet Mailfiles.

Due the extensive number of searches involved here, we expect to receive the CDs that contain the search results in the next few days. I will

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promptly forward them as soon as I finish reviewing their cont nts. I understand that, based on your conversations with Eilleen Clavere, a Lotus Notes format of the emails would be acc ptable to you.

Thanks very much for your patience and understanding. Please feel free to call me if you hav any questions. As always, if there are any additional documents that we found responsiv to th Staff's r quest during this process, we will promptly forward them to the Staff.

Regards,

Xinxin Guo, Esq.
Kirkpatrick & Lockhart Nicholson Graham LLP
Four Embarcadero Center 10th Flr
San Francisco, CA 94111
Direct: [redacted]
Fax: [redacted]
www.klng.com
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Hardy, M linda

From: Hanson, Robert
Sent: Friday, June 03, 2005 10:00 AM
To: Aguirre, Gary J.
Subject: Re: Possible tipper new Pequot Chairman?

Mack is another bad guy (in my view)

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Aguirre, Gary J. [redacted]
To: Ribelin, Eric [redacted]; Foster, Hilton [redacted];
Eichner, Jim [redacted] Conroy, Thomas [redacted]; Glascoe,
Stephen [redacted]; Miller, Nancy B. [redacted]
CC: Hanson, Robert [redacted]; Kreitman, Mark J. [redacted]
Sent: Fri Jun 03 08:36:07 2005
Subject: Possible tipper new Pequot Chairman?

John Mack, who came up on radar screen as possible GE-Heller tipper, has just become chairman of Pequot Capital, according to WSJ article below. Mack moved from Morgan Stanley, adviser in Heller acquisition, to CSFB, also adviser in Heller, in late July 2001, the month of acquisition. The are hundreds of Pequot e-mails referring to Mack, including a dozen in July 2001. See e-mail below between Samberg and his son referring to Mack ("It's nice to have friends in high places...:)" Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets? Please note the happy face which has already come up twice in relating to possible flow of insider info. Ironically, Mack's article quoted below is C-1 of WSJ, just as was when Samberg's exchanged e-mails below.

John Mack to Join
Pequot Hedge Fund
In Chairman's Role

By GREGORY ZUCKERMAN and ANN DAVIS
Staff Reporters of THE WALL STREET JOURNAL June 3, 2005

In the latest example of a prominent financial figure entering the hedge-fund world, former Wall Street heavy-hitter John Mack is joining Pequot Capital Management Inc. as chairman.

Mr. Mack, 60 years old, was co-chief executive of Credit Suisse Group and CEO of that bank's Credit Suisse First Boston until last year, and previously was president of Wall Street firm Morgan Stanley. He will work with Pequot's founder, Art Samberg, to help lead the firm into new markets, recruit money managers and help guide the Westport, Conn., firm. Hedge funds are lightly regulated investing pools, traditionally for the wealthy and institutions.

[John Mack]Mr. Samberg, 64, an investor with a well-regarded record, will remain chief executive of Pequot, which manages about $6.5 billion, effectively running the firm day-to-day. (Meanwhile, a British financial regulator, Gay Huey Evans, is joining a hedge fund run by Citigroup.)

Speculation about where Mr. Mack would land after he was replaced last year at

SEC 00005688

Hardy, Melinda

From: Miller, Nancy B.
Sent: Wednesday, July 06, 2005 5:33 PM
To: Kreitman, Mark J.; Hanson, Robert; Aguirre, Gary J.; Eichner, Jim; Jama, Liban A.
Subject: PCM trading in GE and HF
Attachments: Heller Activity.doc

Hi,

Attached is a table showing PCM's trading in HF and GE as a percentage of volume around the time of the merger. The acquisition was announced on July 30, 2001. (I'm assuming that when a company is shorted that this activity is included in the volume calculation for that day. Let me know if this is incorrect.)

Thanks,
Nancy

H ller Financial Activity
(Note, this is all HF activity on PCM trading report for 2001.)

Date	PCM Shares	Volume	% of Vol.	Price/share	Total
7/2/2001	118,000	394,300	29.9265%	$ 39.0281	$ (4,605,315.80)
7/3/2001	77,200	296,100	26.0723%	$ 40.2122	$ (3,104,381.84)
7/5/2001	10,000	195,000	5.1282%	$ 39.4742	$ (394,742.00)
7/9/2001	15,000	163,100	9.1968%	$ 38.9359	$ (584,038.50)
7/10/2001	110,900	501,500	22.1137%	$ 38.3500	$ (4,253,015.00)
7/11/2001	91,400	177,700	51.4350%	$ 38.3636	$ (3,506,433.04)
7/12/2001	101,300	505,300	20.0475%	$ 39.4324	$ (3,994,502.12)
7/13/2001	50,000	749,300	6.6729%	$ 39.4175	$ (1,970,875.00)
7/17/2001	187,500	558,100	33.5961%	$ 39.1680	$ (7,344,000.00)
7/18/2001	50,000	283,100	17.6616%	$ 38.7562	$ (1,937,810.00)
7/19/2001	30,000	270,400	11.0947%	$ 37.8432	$ (1,135,296.00)
7/20/2001	75,000	1,134,700	6.6097%	$ 36.6953	$ (2,752,147.50)
7/23/2001	60,400	394,800	15.2989%	$ 36.0990	$ (2,180,379.60)
7/24/2001	38,500	227,200	16.9454%	$ 35.8584	$ (1,380,548.40)
7/25/2001	73,000	477,600	15.2848%	$ 35.8609	$ (2,617,845.70)
7/26/2001	50,000	451,700	11.0693%	$ 35.5428	$ (1,777,140.00)
7/27/2001	10,000	101,000	9.9010%	$ 35.9440	$ (359,440.00)
	1,148,200				**$(43,897,910.50)**

7/30/2001	948,200	14,549,100	6.5172%	$ 52.9811	$ 50,236,679.02
7/30/2001	200,000		1.3747%	$ 53.0033	$ 10,600,660.00
	1,148,200				**$ 60,837,339.02**
					$ 16,939,428.52

GE Activity
(AS trading before and after the announcement of th merger.)

Date	PCM Shorts	Volume	% of Vol.	Price/share	Total
7/25/2001	756,600	25,075,500	3.0173%	$43.5847	$ (32,976,184.02)
7/27/2001	34,000	16,467,900	0.2065%	$44.3648	$ (1,508,403.20)
7/27/2001	50,000		0.3036%	$44.3600	$ (2,218,000.00)
	840,600				**$ (36,702,587.22)**
8/13/2001	**906,600**			$42.5316	**$ 38,559,148.56**
					$ 1,856,561.34

Statement of Paul R. Berger
United States Senate
Committee on the Judiciary
December 5, 2006

Chairman Specter, Ranking Member Leahy, Members of the Committee, good morning. Thank you for the invitation to appear before this Committee and to respond to allegations of abuse of authority that have been made by a former staff lawyer of the Division of Enforcement of the United States Securities and Exchange Commission.

I believe that accountability and oversight are healthy, and I commend you, Mr. Chairman, as well as Senator Grassley for taking these matters seriously.

These allegations deserve to be put to rest, for they are utterly and completely false. They are a slur on the good names of literally hundreds of members of the SEC's Enforcement staff, who show up to work each and every day with only one goal in mind – to protect the Nation's investors. And they are a slur on the presidentially appointed Commissioners of the SEC, members of both political parties.

The allegations also are an offense against basic standards of law enforcement. Throughout my 14 years at the SEC's Division of Enforcement, we recommended that the Commission bring cases – or not – solely on the basis of the evidence. If we believed that the evidence was there, we were prepared to be put to our proof in the courts or in administrative tribunals. But suspicion is no substitute for evidence, and innuendo is no substitute for proof.

Mr. Aguirre has done a great deal of damage. To be sure, those who are the subject of Mr. Aguirre's baseless slurs have had to deal with all sorts of inconvenience, disruption, and

embarrassment that come from dealing with this type of matter. I'm more concerned, though, with the harm to investors. For all I know, by publicly disclosing the details of a then-ongoing investigation, Mr. Aguirre compromised the very investigation he falsely claims he was impeded from pursuing.

I fear also that Mr. Aguirre's false claims have made it harder for the Division of Enforcement, which many SEC chairmen, including Chairman Cox, have referred to as the Commission's "crown jewel," to do its job. All members of the Enforcement staff must feel free to do their jobs, to shoot straight, without fear of reprisal from those with whom they may have professional disagreements. It does not help the Nation's investors for their watchdogs to investigate defensively, to make decisions as to whom to investigate and sue – or not to – based on excessive concerns about how enforcement decisions will look if someone tries to twist them for his own purposes. Nor is it fair to those who may be innocent of any charges for Enforcement staff to bring charges solely out of a fear that they may be called before a Congressional committee to explain themselves.

This submission touches in some detail upon some of the many ways in which Mr. Aguirre's allegations are utterly and completely false. I want there to be no doubt about the truth:

- Contrary to what Mr. Aguirre says, he is no whistleblower. My 14 years of law enforcement experience taught me to appreciate how much the public is served by whistleblowers. The SEC's law enforcement efforts have been greatly enhanced by the actions of whistleblowers, and members of this Committee have been in the forefront of efforts to afford them appropriate protection. But Mr. Aguirre was not a long-term valued employee who came forward with reports of wrongdoing and was terminated

for his efforts. No, Mr. Aguirre was a probationary employee who had trouble accepting supervision and who, rather than accepting honest differences in professional judgment, has fabricated fantastic tales in an effort to "explain" why his more experienced supervisors simply had a different view.

- Contrary to what Mr. Aguirre says, no one stopped an SEC investigation in which he was involved while he was at the Commission. In fact, that investigation continued a year after Mr. Aguirre's departure.
- Contrary to what Mr. Aguirre says, no one refused his request to take testimony of John Mack. In fact, Mr. Aguirre was told that his request to take testimony might make sense, but that he hadn't yet done enough investigating to obtain testimony that would be useful. Based on my 14 years of law enforcement experience, I believed then, as I believe now, that it would not have been in the best interests of the government to take Mr. Mack's testimony when Mr. Aguirre wanted, when we had not yet done the investigative homework necessary to make sure that the testimony would be successful from the government's point of view.
- Contrary to what Mr. Aguirre says, no one told him that the SEC staff was reluctant to take Mr. Mack's testimony because he had some "political influence." In fact, I told Mr. Aguirre exactly the opposite and pointed out to him some of the many powerful people, both in and out of government, that the Division of Enforcement had taken on.
- Contrary to what Mr. Aguirre says, Mr. Mack was accorded no special treatment when, in June 2005, lawyers for Morgan Stanley's board of directors called to see if Mr. Mack, who was under consideration to be hired as Morgan Stanley's chief

executive officer, had regulatory exposure. In fact, counsel was told the staff could give no assurance, one way or the other about Mr. Mack's exposure.

- Contrary to what Mr. Aguirre says, his employment was not terminated because he sought to take Mr. Mack's testimony. In fact, the SEC decided not to extend Mr. Aguirre's employment beyond his probationary period because Mr. Aguirre could not or would not accept reasonable supervision and direction and arrogated to himself power that is not supposed to be exercised by any single member of the SEC staff.
- Contrary to what Mr. Aguirre has insinuated, I did not support the decision of Mr. Aguirre's direct supervisors to delay Mr. Mack's testimony to curry favor with any potential employer. No potential employer with which I later dealt had any interest in the outcome of the investigation nor would I ever alter the course of an investigation to curry favor with anyone. It simply did not happen.

Background

I had the great privilege of serving for 14 years in the Enforcement Division of the Securities and Exchange Commission, starting as a staff attorney in 1992 and serving as Associate Director of Enforcement from 2000 until my departure in 2006.

I had senior responsibility for some of the SEC's most significant cases. These included the recent *Fannie Mae* enforcement case, which resulted in a $350 million civil penalty (at that time second only to WorldCom); the financial fraud case against Xerox (which resulted in what was then the largest civil penalty against a company in a financial fraud case); the *AremisSoft* financial fraud case (in which the SEC and the DOJ successfully froze assets in the Isle of Man and repatriated $200 million to the U.S.); cases involving the anti-bribery provisions of the federal securities laws such as the landmark case against Titan Corporation

(which resulted in the largest civil penalty ever paid in such a case and seminal guidance to issuers of securities); executive compensation cases against General Electric and Tyson Foods; and auditor independence cases against KPMG, PricewaterhouseCoopers, and Ernst & Young. During my tenure I supervised investigations that resulted in major cases brought against, among others, Knight Securities, Merrill Lynch, NationsBank and Morgan Stanley.

I participated in literally scores of insider trading investigations, including the *Deephaven Capital* case, (which involved a hedge fund that traded improperly in PIPEs transactions); the *Nalco* investigation against prominent Mexican nationals who paid over $4.7 million in disgorgement and penalties (the case also resulted in 2 criminal prosecutions); and the *McDermott* case against 3 individuals including the former Chairman and CEO of an investment bank (resulted in 3 criminal prosecutions).

I received several awards for my work in the Enforcement Division, notably the Chairman's Award for Excellence and the Commission's Stanley Sporkin Award for excellence in aggressive but fair enforcement activities.

Over the years, I received my share of criticism. In many times, and in many ways, I was told I was being unreasonably tough, that I didn't "understand" how business was done. I've been accused of "overreacting" to small problems by insisting that the Enforcement Division recommend enforcement actions for what defense lawyers deemed "understandable" transgressions. I've been told my investigations went too quickly or too slowly. I've been called names. But I've never been told I was too soft or too lenient, or that I didn't pursue my cases vigorously enough.

The culture of the SEC's Division of Enforcement is to conduct investigations aggressively, fairly, and within the bounds of the laws it is charged with enforcing. Congress

and the SEC itself have given the enforcement staff considerable power. That power must be used wisely and judiciously. The American public expects and deserves nothing less. Senior members of the staff of the Division of Enforcement recognize that the power given to the staff is enormous and can, if used improperly, have a dramatically adverse effect on public companies, on the market place, and on the lives and careers of individuals.

Our power has legal limits as well. For example, the SEC has extremely broad powers to compel the production of books and records of companies and individuals on the basis of little more than official curiosity. But with that power comes stringent protections of individual privacy. The Right to Financial Privacy Act, to take one statute, limits the ability of the SEC to subpoena the financial records of companies and individuals without their knowledge. The Electronic Communications Privacy Act imposes similar restrictions on the SEC's power to conduct electronic searches, and the Privacy Act provides important procedural safeguards to protect the privacy of individuals.

Supervisors at the SEC make every effort to train new staff to use their power in a measured way, always balancing the need to do our due diligence against what is fair and, most important, what is right. Every day at the SEC, in sitting down with my colleagues to discuss a matter, we would ask ourselves one overriding question, "Is this the right thing to do"? I always was careful, in every investigation, to question and consider whether the planned course of action was the right thing to do. I hope, during my 14 years, we made the right decision most of the time.

One of the many decisions that the Division of Enforcement made (well before I joined the SEC), was to create an organizational structure designed to ensure that mistakes were rare and that the staff was doing the right thing. While many people bristle over the multiple layers

of supervision at the SEC – staff attorneys reporting to branch chiefs, who report to assistant directors, who report to associate directors, who report to the Director of Enforcement – that organizational and supervisory structure has served the SEC well for over 40 years. It works because instead of letting one person be responsible for the actions of the SEC, it places numerous, experienced people in an oversight position that demands that questions be constantly asked and re-asked. It works because it forces staff lawyers to evaluate and reevaluate their course of action, their development of the evidentiary record, and their investigative and legal strategy. And it works because it reins in those who think there are investigative shortcuts that avoid the necessity of sound, unglamorous, tedious, and painstaking investigative work.

Gary Aguirre

Mr. Aguirre came to work at the SEC in September 2004. Like every other new employee, he was hired subject to a one-year probationary period. That meant that, unless the SEC decided otherwise, Mr. Aguirre's employment was subject to termination during his first year at any time, for any lawful reason. At the end of a year's employment, Mr. Aguirre was subject to a business decision: either retain him in perpetuity, absent gross misconduct, or terminate his employment.

As a staff attorney, Mr. Aguirre was assigned a branch chief to whom he reported. That branch chief reported to an Assistant Director of Enforcement. The Assistant Director reported to me, as did three other Assistant Directors. I did not supervise Mr. Aguirre's work directly. At any one time, I had anywhere from 150-200 open investigations under my indirect supervision, plus approximately 40 cases being litigated. Though I did not supervise Mr. Aguirre, I soon heard about him. I heard that he was hard working and enthusiastic but that he did not take well to supervision. At some point in the fall of 2004, I learned that Mr. Aguirre had had a falling out

with his branch chief, one of the more talented branch chiefs under my supervision. Apparently, Mr. Aguirre was unhappy with edits to a rather routine memorandum to the Commission on a relatively ministerial matter. Rather than accept his supervisor's edits to his prose, he accused the supervisor of withholding information from the Commission. I looked into it and was able to come up with language that satisfied everyone.

Shortly thereafter, Mr. Aguirre came to me with a proposal that, unlike all other staff attorneys, he be permitted to report directly to his Assistant Director, rather than report to a branch chief. I turned that down. Mr. Aguirre next came to me with a request that he be transferred to a group supervised by a different Assistant Director. He asked that he be assigned to work in a group supervised by Mark Kreitman, who had been his teacher in a securities law class. Initially I refused this request, because there were no openings in Mr. Kreitman's group. I also told Mr. Aguirre that, even though he appeared talented and had substantial experience in private practice, I was concerned about his apparent reluctance to accept supervision. I explained to him that, even though he had significant private experience, there was still much to learn about the SEC's procedures and investigative techniques. Several weeks later, there was an opening in Mr. Kreitman's group, and I granted Mr. Aguirre's transfer request and hoped that the fresh start would signal an end to his apparent difficulty in working with others.

Mr. Aguirre's Allegations Are Baseless

Mr. Aguirre alleges that senior officials of the Division of Enforcement, including me, halted an insider trading investigation involving Pequot Capital Management when he sought to take testimony from John Mack. Mr. Mack is now Chief Executive Officer of Morgan Stanley and had previously served in a similar position at Credit Suisse First Boston. According to Mr. Aguirre, his plan to take Mr. Mack's testimony had met with the enthusiastic support of his

supervisors until, in June 2005, the press reported that Mr. Mack was under consideration for the Morgan Stanley job. Thereafter, according to Mr. Aguirre, his supervisors did an about face. He claims that Robert Hanson, his branch chief, told him that getting a subpoena involving Mr. Mack would be difficult because of Mr. Mack's political influence. According to Mr. Aguirre, the investigation was shut down. When he pressed the issue, he says, he was fired. And when he complained, he says, to the Chairman of the SEC and all the Commissioners, he was ignored.

That would be quite an alarming story – if it had a shred of evidence to support it. Mr. Aguirre has come forward with no evidence – none – that Mr. Mack or anyone else used any sort of influence to stop this investigation. He has relied instead on falsehoods, innuendo, and smears. Here is what they are, and here are the answers.

1. Mr. Aguirre says that the investigation was stopped when it became clear that Mr. Mack was under consideration to be CEO of Morgan Stanley. This is false. The investigation was not stopped at all. In fact, in the months before Mr. Aguirre left, we added two additional staff lawyers to the case, in large part because of concerns about Mr. Aguirre's reliability. Public reports indicate that the investigation continued for a year after Mr. Aguirre left the SEC.

2. As I mentioned earlier, it is true, as discussed below, that Mr. Aguirre's supervisors, including myself, declined to authorize the issuance of a subpoena for Mr. Mack's testimony. But Mr. Aguirre fails to point out that he was told that he was not given the authority to subpoena Mr. Mack *at that time* for the very reason that it was imperative to do *more* investigating to increase the odds that Mr. Mack's testimony would be fruitful. In other words, far from telling Mr. Aguirre to abandon the Pequot investigation, he was told to continue it and not to take shortcuts.

To explain, in insider trading cases, where the investigation starts relatively contemporaneously with the trades in question, it may be useful to get witnesses under oath quickly, before they have a chance to consider their stories and before they can rely on faded memories to justify foggy accounts of the events in question. But where, as in the Pequot investigation, the trades in question are months and years in the past, testimony of witnesses is most useful after reviewing all the documents in question, including phone records and emails. In that situation, to take one example, if investigators ask Mr. X if he spoke to Ms. Y on date Z, Mr. X is almost certain to say that he does not recall. When the question to Mr. X is "why did you speak to Ms. Y seven times between 11 and 2 on August 5, 2005," "I can't remember" is a much harder answer to give with any credibility.

I have been asked what would have been the harm in taking Mr. Mack's testimony when Mr. Aguirre wanted. Taking testimony at the right time serves to speed up the efficient resolution of a case. Taking it too soon means that it will have to be taken twice – at least. As Mr. Aguirre has stated publicly, in the few months he worked on the Pequot investigation he took testimony from some witnesses multiple times. Mr. Aguirre also has stated that he issued over 100 subpoenas in the few months he worked on the Pequot investigation. I was very upset when I learned this; this was several multiples of the number of subpoenas one would ordinarily see in an investigation of comparable scope to the Pequot investigation. Our investigations need to be efficient. And bombarding private citizens and companies with multiple information requests undermines public confidence in our processes.

At what stage of an investigation witness testimony is most fruitful is a matter of investigative judgment. Reasonable persons can disagree. Since this was Mr. Aguirre's first SEC investigation of any sort, much less insider trading investigation, I had no problem relying

on the judgment of Mr. Aguirre's direct supervisors, who were far more experienced, particularly since it was consistent with my own experience from being directly involved in approximately 100 insider trading investigations. Mr. Aguirre's direct supervisors – Mr. Kreitman and Mr. Hanson – were very experienced and very able. They are dedicated public servants and extremely aggressive and effective investigators.

3. Mr. Aguirre alleges that the SEC Enforcement staff did not take Mr. Mack's testimony because Mr. Mack had some power or influence over the SEC. As he put it in his prior testimony, his superiors at the SEC threw "a roadblock" in front of his investigation because of Mr. Mack's "powerful political connections." To this day, I have no idea what Mr. Aguirre is talking about; I have no knowledge of Mr. Mack's political connections, powerful or otherwise. Until I read in the press that Mr. Mack was a donor to the Republican Party, I had no idea whether Mr. Mack was a Republican or a Democrat. I cannot fathom to this moment how Mr. Aguirre thinks Mr. Mack might have exercised his "powerful political connections."

I do know that the staff of the Enforcement Division is totally and completely non-political. In all my years of government service, no one ever asked me if I was a Republican or Democrat. We did not bring or fail to bring cases based on people's political connections or affiliations. As for Mr. Mack's alleged Republican connections, I note that during my tenure at the SEC, it was publicly reported that the Enforcement Division vigorously investigated cases involving the then Governor of Texas, the Vice-President of the United States, and the Majority Leader of the Senate, all Republicans.

I explained all this to Mr. Aguirre when he complained to me about his supervisors' unwillingness to authorize a subpoena for Mr. Mack's testimony at the time Mr. Aguirre wanted it. His complaint was not that Mr. Mack had influenced anyone not to take his testimony but that

on the judgment of Mr. Aguirre's direct supervisors, who were far more experienced, particularly since it was consistent with my own experience from being directly involved in approximately 100 insider trading investigations. Mr. Aguirre's direct supervisors – Mr. Kreitman and Mr. Hanson – were very experienced and very able. They are dedicated public servants and extremely aggressive and effective investigators.

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I explained all this to Mr. Aguirre when he complained to me about his supervisors' unwillingness to authorize a subpoena for Mr. Mack's testimony at the time Mr. Aguirre wanted it. His complaint was not that Mr. Mack had influenced anyone not to take his testimony but that

we were afraid to do it. I explained to him that this could not be further from the truth, that the Commission had a history of investigating cases on their merits, without regard to the identity of potential subjects of the investigation. At the time, Mr. Aguirre seemed satisfied with our conversations, and his later allegations surprised me.

4. When he testified before this Committee on June 28 of this year, Mr. Aguirre seriously distorted a conversation he heard on the speakerphone between Mr. Kreitman and me in June 2005. Mr. Kreitman called me to tell me about a request from the head of compliance at Morgan Stanley that we tell him whether Mr. Mack had a serious problem, because Morgan Stanley was thinking of hiring Mr. Mack to be its chief executive officer. Mr. Kreitman called me on my cell phone to ask my views and said we should consider telling Morgan Stanley we were serious about Mr. Mack. This much is essentially accurate.

Mr. Aguirre further testified that I abruptly interrupted Mr. Kreitman and said, "I don't think we are," – meaning, serious about Mr. Mack – and "we shouldn't say anything." Mr. Aguirre said that he was surprised about my comments, because I was not fully up to date with the progress of the investigation. After that, Mr. Aguirre testified, the attitudes of his supervisors changed.

Mr. Aguirre is correct that I answered abruptly. I was speaking from a mobile phone on the street outside my doctor's office. It was not my practice to discuss sensitive SEC matters over unsecured wireless lines, much less in a public place. Mr. Aguirre is also correct that I believed we should be extremely circumspect about what we told Morgan Stanley about the investigation. It is SEC policy that it does not intrude into private business decisions, nor should individual staff members give their opinions about the likely outcome of investigations in progress. That was particularly the case where Morgan Stanley was not a party to the

investigation, and Mr. Mack was not even a Morgan Stanley employee. If we were to give an opinion to Morgan Stanley about the probable outcome of an ongoing investigation, we would run a substantial risk of, depending on the ultimate outcome of the investigation, either damaging the career of a person we later concluded was innocent of any wrongdoing or causing a regulated entity to employ as its chief executive officer someone who we later concluded was complicit in serious wrongdoing. Either outcome would have been unfortunate and inappropriate.

Mr. Aguirre distorted the truth by testifying that I said we were not "serious" about Mr. Mack. I did not in any way indicate a view on the merits of the investigation as it related to Mr. Mack. I don't make those statements casually; I don't make them without weighing the evidence; and I certainly don't make them on the streets of Washington. And that was the very point I was making: we were in no position in the middle of an investigation to give opinions on its likely outcome. To the extent Mr. Aguirre testified that I indicated a view on the merits, and that the view was that evidence indicated that Mr. Mack could not be complicit in any wrongdoing, that testimony is false.

I returned the call to Morgan Stanley's head of compliance. I told him we could not tell him anything about the progress of the investigation. He asked if there was anything they could do to help us reach a resolution. I told him I would let him know if it turned out there was. That was the end of it.

5. Mr. Aguirre alleges that his employment was terminated because he wanted to take Mr. Mack's testimony. This is simply untrue. Mr. Aguirre testified that this must be the case because the Enforcement staff had no other reason to decline to extend his employment beyond the one-year probationary period. Sad to say, Mr. Aguirre is not the first employee to be blind to his own shortcomings.

As I previously noted, when I accommodated Mr. Aguirre's request to transfer to Mr. Kreitman's group, I raised with him my concerns about his willingness to tolerate supervision. These concerns did not abate following Mr. Aguirre's transfer. While Mr. Aguirre's supervisors praised his talent and his appetite for hard work, they complained that he was unwilling to comply with Commission procedures.

For example, Mr. Aguirre's supervisors discovered that he had issued two subpoenas on his own that did not comply with applicable privacy laws. While we were able to cure the matter quickly by canceling the subpoenas and issuing appropriate ones, we took the matter seriously. As a law enforcement agency, it is imperative that the SEC itself complies with the laws enacted by the Congress. Though no harm was done, Mr. Aguirre's refusal to act within the system could have had significant repercussions.

It also came to my attention that Mr. Aguirre was on occasion abusive and hostile with private counsel; I heard of episodes in which Mr. Aguirre made demands on counsel that were inconsistent with SEC policy, in which he shouted in testimony, and hung up on counsel in the midst of telephone calls. That type of behavior might be common practice on the part of private litigants, but it has no place with those representing the government of the United States. Again, Mr. Aguirre's propensity for going it alone raised doubts about his capacity to function within an organization.

During the late spring and summer of 2005, the complaints from Mr. Aguirre's supervisors about his conduct became more frequent. I was told that when they disagreed with him, at times, he flew into a rage. Several times, I was told, he simply left the premises for a day after a discussion with his supervisor about a professional matter. At one point, I learned that Mr. Aguirre purported to resign and then rescinded his resignation shortly thereafter. In the

summer of 2005, he did it again, this time submitting his resignation to me, and again changing his mind a few days later. I became concerned about Mr. Aguirre's reliability and assigned additional attorneys to the Pequot investigation to ensure continuity in the event Mr. Aguirre resigned again. I heard from Mr. Kreitman or Mr. Hanson that Mr. Aguirre was unwilling to work collegially with the new members of the Pequot team. One of them – in my opinion one of the best junior lawyers in the group – balked at continuing to work with Mr. Aguirre.

Also during the summer of 2005, Mr. Aguirre's supervisors showed me a draft work evaluation for the period running through the end of April 2005. The evaluation praised Mr. Aguirre's diligence and recommended that he receive a two-step pay raise. I had no problem with the evaluation. I had little first-hand familiarity with Mr. Aguirre's work, and his supervisors had told me that he was talented and hard working. I certainly had no problem with the pay raise. I believed that many of our Enforcement staff members were underpaid and that hard work and dedication should be rewarded.

I noted, though, that the draft evaluation did not contain any constructive criticism. In light of the complaints I had gotten from Mr. Kreitman and Mr. Hanson about Mr. Aguirre's conduct, I raised with them whether they wanted to include any such criticism. They pointed out that the evaluation draft concerned Mr. Aguirre's conduct through April 2005, and their concerns had gotten much more acute since then. I left the decision to them, because they were the ones with the experience working with Mr. Aguirre. They decided that, to be fair to Mr. Aguirre, they should include some constructive criticism. They showed me those comments and told me that they had relayed their substance to Mr. Aguirre. I believed that these statements were included in Mr. Aguirre's personnel file. In September 2005, after Mr. Aguirre's employment was terminated, it turned out that they had not been, apparently as a matter of inadvertence.

Shortly after Mr. Aguirre's evaluation was completed, he was awarded a two-step increase at a meeting at which senior staff of the Enforcement Division reviewed proposed compensation for literally hundreds of lawyers, accountants, and support staff. I do not remember the discussion of Mr. Aguirre, which must have been brief. As noted, I was comfortable with the recommendation that he get a two-step increase, which was typical, principally as a reward for his hard work.

Later, when it came time to decide whether Mr. Aguirre should, in effect, be given a tenured position at the SEC or whether we should decline to extend his employment beyond his probationary period, we decided to terminate his employment for the reasons I have just indicated. Perhaps we were too generous in our earlier evaluation of Mr. Aguirre. Perhaps we should have been more critical of his performance almost from the outset. These are fair comments. But it is grossly inaccurate to suggest that the criticisms that did emerge were pretexts, much less that they were an after-the-fact rationalization for an improperly motivated decision to terminate Mr. Aguirre.

6. Mr. Aguirre has alleged, and it has been reported in the press, that my employment at my law firm was some sort of payoff for my role in derailing Mr. Mack's testimony. This is a complete fabrication. Again, Mr. Aguirre offers no evidence here, just innuendo. The allegation is deeply offensive, not only to me but to my colleagues in the government and now in private practice. It is also nonsensical on its face. So far as I know, there is no evidence from any source that the firm tried to derail any testimony from Mr. Mack or anyone else. I believe the record is quite clear that the firm was retained by the board of directors of Morgan Stanley to perform due diligence on whether to hire Mr. Mack. It contacted the SEC only to determine whether he had any risk from the Pequot investigation and whether, as a result, there was any

risk to Morgan Stanley in hiring him. From what I understand, the firm's representation of the Morgan Stanley board of directors lasted for exactly six days in June 2005 and at no time involved advocating any position concerning Mr. Mack or seeking any action on his behalf. The firm played absolutely no role in connection with Mr. Mack or the Pequot matter thereafter. It is a leap without any foundation in fact to jump from this evidence of extremely limited involvement of the firm for purposes of seeking information to a conclusion that the firm in any way sought to influence the outcome of the investigation.

The record is clear that I absolutely did not give the firm the information it sought. I was never contacted by the firm on this matter, and as indicated previously, my only involvement was to deny a request from Morgan Stanley that we provide it an assessment of the risk to Mr. Mack. I understand that the SEC staff provided no information to the firm on the probable outcome of the investigation and was not at all reassuring; indeed, I'm told that the staff said that it was simply too early in the investigation to draw any conclusions.

As for my employment with the firm, my first contact with the firm was in January 2006, nearly six months after Mr. Aguirre's employment was terminated. At no point during any of the numerous discussions I had with partners of the firm about the prospect of joining them was there *any* discussion of Mr. Mack, Morgan Stanley or the Pequot matter. It never came up and was completely irrelevant to the hiring process.

I did know in September 2005 that a colleague of mine was interviewing at the firm. Before he went, he told me that it would be great if we could practice together and that he would like to mention to the firm that I might be interested in leaving the Commission. I told him that he could do that but that no firm would be interested in two partners from the government with no book of business. After I did so, I checked with the SEC's Ethics Office to confirm whether

this contact would be sufficient to cause me to recuse myself from the firm's cases before the SEC. I was told that no recusal was necessary. As I predicted, the firm expressed no interest and I had no contact whatsoever with the firm until January 2006 – seven months after the firm ceased playing any role in connection with Morgan Stanley's decision to hire Mr. Mack.

Mr. Chairman, I thank you again for the opportunity to set the record straight. For fourteen years, I gave everything I had to further the mission of the Securities and Exchange Commission to protect our Nation's investors. I had the privilege of working with colleagues of enormous talent and dedication. Every day, they take the Commission's "crown jewel" and through their hard work, skills, decency, and honor, they add to its luster.

I would be pleased to answer any questions.

PAUL R. BERGER

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PRESENT POSITION

Partner, Debevoise & Plimpton LLP
Washington, DC

Practices in the Litigation group, focusing on securities litigation, enforcement and white collar criminal defense matters.

PREVIOUS EXPERIENCE

Associate Director, Division of Enforcement, United States Securities and Exchange Commission. 2000-5/2006

Supervised and conducted investigations and enforcement activities under all of the Federal Securities Acts, litigation, administrative proceedings and injunctive actions arising out of such investigations and general enforcement activities. Served as a principal advisor to the Director of Enforcement and to the Commission on both specific and broad enforcement programs and policies. Developed, conceived, planned, implemented and had overall responsibility, as well as delegated authority, for policies and guidelines affecting broad, emerging critical agency programs. Advised and collaborated with the Office of General Counsel in the conduct of civil litigation in the federal district and appellate courts relating to the antifraud, anti-manipulative, and other provisions of the securities Acts, and in the conduct of administrative proceedings. Advised the Director on policy determinations and decisions on all matters in the Division and presented to the Commission the recommendations of the Division.

Established and maintained effective working relationships with various high-level individuals, including senior members of legislative and executive agencies, executives of major corporations, and distinguished members of the public. Established and maintained close and cooperative working relationships with SEC management and officials, government agencies, and other institutions with related interests, in order to advance the programs and objectives of the SEC.

Actively participated on boards and committees as a representative of the SEC. Served as the principal representative and consultant for the agency at interagency and international meetings. Communicated with the press to ensure the Commission's message and objectives effectively reached the marketplace. Developed budget priorities

for the Division's technology and analyzed the technology needs for the Enforcement program.

Proposed, established, and Chaired the Division's *Financial Fraud Task Force*. The Task Force takes on difficult and leading edge investigations that may enable the Commission to send important signals to the financial marketplace that will help fulfill the Commission's mission of protecting investors. The Task Force works closely with the Chief Accountant of the Commission and the Director of Corporation Finance. The Task Force handles all complaints and referrals of potential financial reporting matters, triages those matters and expedites assignment.

Notable enforcement cases initiated, supervised, and/or directly prosecuted over the last few years include actions that span the full spectrum of the federal securities laws, including:

Financial fraud cases against – *Federal National Mortgage Association* ($350 million penalty, the second largest penalty ever assessed by the SEC at the time); *Lucent* and its senior management ($25 million penalty); *Xerox* and 6 senior executives (disgorgement and penalties of over $32 million), and *KPMG* (disgorgement and penalties of $22 million) and 5 audit partners (currently in litigation against 4 of the partners); *AremisSoft* and senior management (successfully froze assets in the Isle of Man and repatriated $200 million to the U.S.); *ACLN* and senior executives (froze over $45 million in 4 European countries, and by May 2006 had repatriated almost $28 million to the Court's registry); *Huntington Bancshares* and senior executives (returned over $8.5 million to investors); and *Take-Two* and its senior executives (returned in excess of $13 million to investors).

Foreign Corrupt Practices Act (FCPA) cases against – *Titan* alleging illicit payments to the president of Benin's presidential campaign (resulted in a payment of disgorgement and penalties [in the DOJ action] of $28 million, the largest FCPA settlement to date); the *Titan* case also resulted in the Commission's issuance of a significant *21(a) Report* to provide guidance concerning potential liability under the antifraud and proxy provisions of the federal securities laws for publication of materially false or misleading disclosures regarding provisions in merger and other contractual agreements; *ABB Ltd.*, the first time the Commission sought and obtained disgorgement ($5.9 million) in an illicit payments case; *Triton*, *Baker Hughes* (includes the first SEC/DOJ joint complaint), *Syncor,* and *Monsanto*.

Executive Compensation cases – Undertook a broad-based investigation of executive compensation issues. The investigation culminated in two enforcement actions brought against *General Electric* and *Tyson Foods*. Both cases highlighted the critical need for accurate and full disclosure of executive compensation to ensure that investors have a complete understanding of how public companies use shareholder assets.

Auditor Independence cases against – *KPMG* for the *Xerox* audits; *KPMG* for the impairment of independence of the AIM Funds; *Ernst & Young* for independence violations with respect to PeopleSoft (resulted in a successful litigation in which the Chief Administrative Law Judge barred E&Y from accepting new audit clients for 6 months); *Moret Ernst & Young*; and *PwC/Avon*.

Regulation Full Disclosure (FD) cases against – *Schering-Plough* and its former chairman/CEO, obtained a $1 million penalty against the company and a $50,000 penalty against the CEO (the first penalty obtained against an individual in a Regulation FD case); and *Flowserve*, the company's CEO and director of investor relations (the case represents the first settled action brought by the Commission against a director of investor relations and the first reaffirmation FD case).

Broker-Dealer cases against – *Knight Securities*, the first fraud case ever filed against a broker-dealer for failure to provide "best execution" to institutional clients (the settled action resulted in a payment of $79 million in disgorgement and penalties, and a settled fraud action against the principal sales trader at Knight resulted in payment of $4 million in disgorgement and penalties); *Merrill Lynch*, involving a systemic failure to produce emails promptly to the SEC emails and resulted in a $2.5 million penalty and the appointment of an independent consultant); *NationsBank*, a sales practice case that resulted in a penalty payment of $4 million; *Morgan Stanley* (supervised matter, though filed shortly after leaving the Commission), for failing for years to maintain and enforce adequate written policies and procedures to prevent the misuse of material non-public information, including the failure to conduct any surveillance of hundreds of thousands of employee and employee-related accounts to determine whether any insider trading occurred, which resulted in a $10 million penalty and the appointment of an independent consultant.

Insider Trading cases – *Deephaven Capital*, a hedge fund, for trading in PIPEs transactions; *Nalco* investigation against prominent Mexican nationals who paid over $4.7 million in disgorgement and penalties (the case also resulted in 2 criminal prosecutions); *McDermott* case against 3 individuals including the former Chairman and CEO of an investment bank (resulted in 3 criminal prosecutions).

Worked with a former Director of Enforcement and the Financial Fraud Task Force to research the legal theories for possible stock options investigations, and began the Division of Enforcement's program of stock options investigations.

Other notable cases included the *Fast-Trades* Internet price manipulation case against Georgetown Law students; the *E.ON AG* case, the Commission's first action against a foreign issuer for making false statements concerning merger negotiations; a fraud and transfer agent action against *CIBC* resulting in $6 million in penalties and

disgorgement; an important Section 5 registration case against *Goldman Sachs* that provides guidance on gun jumping: and *Solucorp*, the first Section 10A case.

From 2003 through 2005, brought actions against 38 CEO/CFOs and 5 accounting firms; sought 62 officer and director bars; brought 23 Rule 102(e) proceedings; brought 9 12(j) deregistration proceedings; imposed 5 trading suspensions; and brought actions that resulted in 38 criminal prosecutions.

1996 – 2000	*Assistant Director*, Division of Enforcement
1994 – 1996	*Branch Chief*, Division of Enforcement
1992 – 1994	*Senior Counsel*, Division of Enforcement
1989 – 1992	*Associate*, Jenner & Block, Washington, DC
1986 – 1989	*Staff Attorney*, U.S. Court of Appeals for the District of Columbia Circuit
1985 – 1986	*Attorney*, John P. Meade, O'Connor & Hannan, Washington, DC
1983 – 1985	*Attorney*, Law Offices of Jan Schneider, Washington, DC

EDUCATION

Antioch School of Law	J.D. 1982
University of Wisconsin	Ph.D. Candidate, 1972-1974
The American University	B.A. 1972 *(cum laude)*

AWARDS

Stanley Sporkin Award
Chairman's Award for Excellence

RICHARD BLUMENTHAL
ATTORNEY GENERAL

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Office of The Attorney General
State of Connecticut

TESTIMONY OF
ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
DECEMBER 5, 2006

I appreciate the opportunity to speak in support of proposed legislation to toughen penalties and enforcement against securities fraud and require greater disclosure to investors by hedge funds.

The integrity of our securities and investment markets is critically important to the economic future of our country. Yet, almost daily, news about insider trading, questionable accounting practices and other indicia of possible wrongdoing demonstrate the need for investor protection.

The trend toward increasing transparency is inevitable. As hedge funds themselves raise capital in more conventional ways -- going public, selling bonds and unsecured securities -- they must play by rules requiring disclosure. Risk disclosure and risk control are two key elements. There must be adequate, accurate transparency of how much risk and in what forms an investor can anticipate and what controls exist to assure that risk strategies are followed and internally enforced. Investor due diligence may achieve such disclosure for many, but not all investors Some hedge fund investors need help.

New potential dangers are emerging and expanding -- in the growing dimensions of leverage and debt, and increasing use of new financial instruments such as credit default swaps.

Congress must act -- or the states may fill the void -- to provide stronger tools for the SEC to promote sound hedge fund management and disclosure of critical information. Hedge funds remain a regulatory black hole.

My strong preference is for national standards and rules, federally enforced, since federal agencies have the resources and expertise as well as the authority to make enforcement effective. We should avoid a patchwork of differing state laws. But federal inaction or inertia will invite -- and inspire -- state action, sooner rather than later, as early as 2007.

The discussion draft's proposed provisions are a positive first step, a solid framework for further discussion and Congressional action. Many of the principles require greater detail for adequate assessment, let alone enforcement. I support this initiative and its concepts, and urge

further consideration of specific provisions. I will propose a set of reforms in the coming months.

My proposals will include strong new measures for protecting and supporting whistleblowers, including secure means of access and even specific incentives. Key to effective detection and investigation are the cooperation and insights of individuals willing to risk their livelihoods and reputations with leads, tips, guidance and documents. They must be protected against retaliation or revenge -- direct or indirect -- and rewarded and respected publicly for their courage and conviction.

One critical proposal missing from the discussion draft is a set of higher threshold requirements in assets for accredited hedge fund investors. The Committee should consider increasing the minimum asset, income and investment levels for qualified persons to invest in hedge funds. A qualified investor might be required to have, for example, at least $2 million in assets and $1 million in income, to invest at least $500,000. These numbers are illustrative, not final. Such asset requirements would help ensure that hedge fund investors are capable of doing the due diligence and assessing the risks that informed hedge fund participation requires.

Even with these limits, the Committee should consider more demanding disclosure requirements as well as a tough code of ethics.

Equally important, the Committee should consider strict penalty proposals to enhance deterrence of wrongdoing. A broad spectrum of penalties would include both criminal and civil fines with concurrent federal and state enforcement authority.

Reforms are driven by retailization of hedge funds -- and by their increasing sway and impact on our entire economy.

Connecticut values its role as home to many hedge funds -- and investors in hedge funds. I have personally met with numerous hedge fund managers, including some of the most prominent, as well as investors, academics, attorneys and advisors. While specific provisions may be debated, I am convinced that some degree of public oversight is necessary and inevitable.

Federal action such as the proposed legislation is preferable to state legislation because it is uniform and national in scope -- providing protection for everyone, not just investors in particular states. It assures a level playing field, avoiding competitive disadvantages for hedge funds in one state versus others.

When used appropriately, hedge funds serve very productive investment purposes -- such as allocating risk, increasing market efficiencies, making available capital and motivating management. They have clearly grown in investor reach and power.

Today, hedge funds investors include pension funds, charities and university or educational endowments, and a broad cross-section of the investing public. Not all of them -- big as some pension funds or endowments may be -- have the resources or capacity to effectively elicit and analyze key information.

Hedge fund leveraging itself has profound financial and public policy implications, increasing their power and importance in the markets. Hedge fund clout has increased dramatically. Hedge funds can be highly leveraged, activist and interventionist, single or multi-strategy. Previously, hedge funds were private in both investors and impact. Today, hedge funds are public, with power to affect diverse public markets, as Amaranth showed.

This discussion draft properly looks to existing anti-fraud laws and current investor disclosure rules as guidance for any regulation of hedge funds.

The proposed legislation requires hedge funds to disclose the following critical information to their investors: (A) investment objectives and strategies; (B) risks of making an investment; (C) baseline performance; (D) side agreements between the hedge fund and preferred investors that varies the material terms of general investor agreements; (E) the extent to which a qualified external audit is conducted on the hedge fund financial statements.

One key question is whether such information is already available to hedge fund investors -- and in what form, to whom, and when or how often.

Another issue is whether to require disclosure of the hedge fund's use of debt to leverage returns -- a key risk factor -- and its contracts with brokers and stock analysts. Certainly this concept merits strong Committee consideration.

In addition, the Committee should seriously consider requiring that any hedge fund with assets exceeding a specified amount engage an independent external auditor -- tasked not only to review the accuracy of the fund's financial statements but, perhaps most important, to verify the true value of the hedge fund's investments. Often, hedge fund investments may be difficult to value because they are not publicly traded. In some instances, hedge funds have inappropriately valued certain investments to enhance their stated rate of return to investors

I support further consideration of two other provisions of the discussion draft: first, requiring hedge funds to register under the Securities Act if more than 5% of its capital is from investors who are pension funds or non-qualified persons. (Pension funds may expose individuals to the risks of hedge funds.) Second, requiring hedge funds to adopt a code of ethics and a compliance program to prevent wrongful release of non-public material information. Protecting such information from misuse and investor fraud is particularly important to the integrity of financial markets.

My discussions with a very extensive variety of hedge fund investment firms and analysts -- promising only that I would name none of them directly or indirectly -- indicate that many see some reform as necessary and timely. The concept of a code of ethics would have broad potential acceptance. Indeed, some groups such as the Managed Funds Association and Centre for Financial Market Integrity already have codes of ethics applicable to the hedge fund industry. The Committee should consider requesting the Securities Exchange Commission (SEC) study the existing codes, take input from investors, analysts, fund managers and advisors in determining the most effective code of ethics

The proposal also adopts in statute the SEC rule regarding registration of hedge fund advisors under the Individual Advisors Act of 1940. The SEC rule was struck down by the federal court of appeals as beyond the statutory authority of the SEC. This provision would specifically authorize the SEC to register these advisors.

I strongly endorse one critical concept based on the federal qui tam law -- authorizing the U.S. Attorney General to provide an incentive to individuals who supply critical information about insider trading or other investor fraud of up to 30% of the fine or penalty. Whistleblower protection and incentives are critical because they produce vital tips, leads and sometimes road maps for investigation. Laws are effective only if they are diligently enforced with visible results. Such incentives have proven effective in encouraging individuals to act against companies that defraud the U.S. Government procurement.

I support protecting whistleblowers from retaliation by allowing the victim to bring a civil action for damages. Protection from retaliation is a central aspect of any whistleblower law. In Connecticut, my office investigates whistleblower complaints about fraud and waste in government. Our retaliation protection law seeks to support and encourage whistleblowers who risk their livelihoods and careers by coming forward with evidence of wrongdoing. The Committee should consider enhancing this protection by allowing the victim to recover treble damages. Treble damages would be an even greater deterrent against retaliation. If no other proposal is adopted, this one for enhanced whistleblower protection and incentives should be. Either in the SEC or elsewhere, confidential access -- a channel for volunteering information – should be established.

As the Committee moves forward with this discussion, it should consider providing additional civil remedies and state attorney general enforcement authority. Often, civil action may be more efficacious since it requires no evidence of criminal intent. Concurrent enforcement authority among the federal government and the states has proven very effective in the consumer protection area. The Federal Trade Commission has worked with state attorneys general in many areas of consumer fraud, including telemarketing, odometer tampering and dangerous toys.

I commend the Senate Committee on the Judiciary's initiative in this area of significant concern. I look forward to continuing to work with the Committee.

U.S. SENATE COMMITTEE ON
Finance
SENATOR CHUCK GRASSLEY, OF IOWA - CHAIRMAN
http://finance.senate.gov

Opening Statement of U.S. Senator Chuck Grassley of Iowa
Judiciary Committee Hearing
Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity
Tuesday, December 5, 2006

Good morning, I would like to thank Chairman Specter for calling today's hearing on the enforcement efforts against criminal insider trading and hedge fund activity.

Before I get to the body of my opening statement, I would like to take a moment today to publicly thank the SEC and Chairman Cox for the continued cooperation in providing access to documents, information, and witnesses to both the Finance and Judiciary Committees during the course of this investigation. The access granted has been helpful in getting to the bottom of some serious allegations. I commend the SEC and Chairman Cox for recognizing the Constitutional duty that Congress has in conducting oversight over federal agencies. It is my hope that as we go forward we will continue to see such helpful cooperation. A lot of other federal agencies, especially the Department of Health and Human Services and the Justice Department, could learn a thing or two from the SEC in this regard.

Today's hearing is the second held by this Committee relating to penalties for enforcement of illegal insider trading and the third that has discussed the evolving role of hedge funds. Like Chairman Specter, I have concerns about the extent of insider trading and its impact on public confidence in the fairness and integrity of the stock market. As Chairman of the Committee on Finance, I have taken an interest in hedge funds and the impact they have on pensions, markets, and all investors.

Hedge funds represent a growing trend in the financial markets where complex forms of institutional trading are seeing an influx of investors. More and more, the hard earned pensions of millions of Americans are being invested in hedge funds. The lure of large returns that hedge funds offer is an enticing deal that represents the best intentions of a free market economy. The use of hedge funds for pension investment is not necessarily problematic. However, when a hedge fund goes belly-up, as was the case with Amaranth Advisers, the government and the American taxpayer could be left to foot the bill.

The increasing role played by hedge funds and the expectation of consistent, market-beating returns could lead to increasing pressure on fund managers to deliver by any means, such as riskier investments, or worse, illegal trading on inside information. Recent reports in the media and testimony submitted to this Committee suggest that there has been increased trading activity before major market events, leading some to believe that insider trading is on the rise.

Any illegal activity in the financial markets must be investigated and prosecuted to the fullest extent of the law. The financial markets work based on the belief that the average investor has the same access to information as the big boys. Today's hearing will examine this enforcement to see if we need to do anything legislatively to strengthen the criminal laws against insider trading.

This hearing will ask some tough questions of the market regulators and enforcers. Does the SEC have the tools and resources it needs? Does the Department of Justice prosecute to the fullest extent when criminal violations are found? This Committee has jurisdiction over the criminal laws and we need to see that they are enforced with the way that Congress intended.

We are also here today to discuss the allegations brought by former SEC attorney, Gary Aguirre. His allegations led to a joint Finance-Judiciary Committee investigation on whether there was retaliation against Mr. Aguirre for his role in the investigation of a large hedge fund. The Senate investigation also focused on the original investigation conducted by that office into the same allegations.

We'll hear evidence from the Senate committees' investigation, along with information learned through witness interviews and an extensive review of SEC documents. We'll dig into why the Inspector General failed to uncover important evidence that appears to corroborate many of those allegations.

We'll also question Mr. Aguirre's supervisors about the debate inside the SEC surrounding whether and when to ask a high-profile Wall Street executive, John Mack, some key questions in its insider trading investigation of Pequot Capital Management. The resistance to taking Mr. Mack's testimony until after the press and Congress put a spotlight on the issue raises serious questions for me about whether "captains of industry" get the same treatment as regular investors or whether they get treated with kid gloves.

Finally, we'll question Mr. Aguirre's supervisors about the SEC's personnel process and why an alternate, negative evaluation of Mr. Aguirre was submitted into his personnel file after he was fired. I'd like to hear how they can square that with Mr. Aguirre's original, positive evaluation and pay increase. It looks like that negative evaluation was only created after Aguirre started complaining to his supervisors that it was unfair to treat John Mack differently than the SEC would treat an average investor in the same situation. That's not a legitimate reason to go back and change an employee's performance evaluation.

These issues point to problems within the agency that distract from its core mission of protecting investors. This hearing can kick start some necessary changes at the SEC. This hearing is about finding solutions as well as exposing problems. With that, I must excuse myself to chair a previously scheduled hearing before the Finance Committee, but I will return for some questions later in the hearing.

Testimony Concerning SEC Personnel Matters

by Robert B. Hanson
Branch Chief, Division of Enforcement
U.S. Securities and Exchange Commission

Before the U.S. Senate Committee on the Judiciary
December 5, 2006

Chairman Specter, Ranking Member Leahy, and Members of the Committee:

Thank you for inviting me to testify today and to respond to false allegations of abuse of authority that have been advanced by a former staff attorney of the United States Securities and Exchange Commission. I greatly appreciate the opportunity to set the record straight on the matter about which Gary Aguirre testified to this Committee last summer. I will start with an introduction that summarizes my testimony and then provide further details.

Summary

Let me state at the outset that, in my experience, the Division of Enforcement of the SEC has never considered an individual's political connections in deciding whether or not to take his or her testimony. No one has ever asked or suggested that I refrain from taking a person's testimony because of his or her political connections. Indeed, Enforcement investigations frequently involve well known and prominent individuals. In conducting and supervising investigations, I always follow the evidence wherever it leads -- even if the trail points to a prominent executive or a public figure. In the investigation concerning the hedge fund Pequot Capital Management, I have no reason to believe any outside source ever attempted to influence the decision on taking the testimony of John Mack, the current CEO of Morgan Stanley.

As you are aware, Mr. Aguirre was terminated before his one-year probationary period expired. Until he completed his probationary period, Mr. Aguirre could be terminated at any time, for any lawful reason. Mr. Aguirre was a highly energetic staff attorney, but his conduct was often inappropriate and his behavior unsuitable for continued employment in the Enforcement Division. He was unable or unwilling to work in a professional manner with other attorneys on the investigation and he failed to observe Enforcement Division policy on several occasions. In the spring of 2005, Mr. Aguirre twice left work abruptly during the workday after disagreements with other attorneys. He tendered his resignation from the Commission in July 2005. Some time thereafter he withdrew his resignation. Then Mr. Aguirre said he would leave after completing the investigation but would not memorialize the investigative findings. His erratic behavior and the negative impact it was having on the investigation and the other attorneys on the case compelled me to strongly urge others to terminate Mr. Aguirre before his one-year probationary period ended.

Mr. Aguirre's public assertion that the Pequot investigation was halted or somehow ceased after he was terminated is completely untrue. In fact, after he was terminated, the Division of Enforcement continued the investigation, devoting hundreds of staff hours to the matter. After Mr. Aguirre's termination, investigative staff took testimony from or interviewed more than a dozen individuals, made numerous formal and informal document requests, reviewed and analyzed thousands of documents, and participated in two proffer sessions with the Federal Bureau of Investigation and the office of the U.S. Attorney for the Southern District of New York. Ultimately, after a thorough investigation, we closed the matter after finding insufficient evidence to warrant bringing an enforcement action.

My Professional Background

I am currently employed as a Branch Chief in the Division of Enforcement at the SEC, where I have worked for approximately six and one half years. I currently supervise five staff attorneys on approximately ten active investigations.

Prior to working the Division of Enforcement, I worked as an attorney in the SEC's Office of Compliance, Inspections and Examinations for approximately two years. I have received several awards while working at the SEC, including a Division Director's Award and a Chairman's Award for Excellence. I have an extensive background in accounting and finance, having practiced as a CPA for many years before entering law school. I have spent my entire legal career in federal government service. It has been a great honor and privilege to do so.

During my tenure at the SEC, I have interviewed or taken the testimony of dozens of prominent individuals, including: (1) principals of brokerage firms, hedge fund advisers and publicly-traded companies; (2) executives of a major stock exchange; and (3) a former United States Senator. While working in the Division of Enforcement, I have participated in bringing several significant SEC enforcement cases including:

- Financial fraud cases against (1) AremisSoft Corp. and senior management (working with the Department of Justice to repatriate $200 million to the U.S.); and (2) Huntington Bancshares Corp. and three of its senior officers;

- Broker-dealer fraud cases against ICapital Markets (formerly Datek Securities Corp.) and Heartland Securities, and actions against a number of principals of those firms (resulting in some of the highest penalties ever collected from individuals in an SEC proceeding);

- A fraud case against broker-dealer Robertson Stephens, Inc. and a former research analyst of the firm;

- An insider trading case against hedge fund adviser Deephaven Capital and a former portfolio manager of Deephaven; and

My Supervision of Mr. Aguirre

In late January 2005, Mr. Aguirre was transferred to my supervisory group after he requested a transfer out of the enforcement branch to which he was initially assigned. The investigation he had been working on for approximately five months, a matter involving hedge fund adviser Pequot Capital Management, then came under my supervision. Over the course of the next several months, I became more intimately involved in the investigation.

Over time it became clear that Mr. Aguirre could not work collaboratively with other attorneys on the Pequot investigation. Though Mr. Aguirre was initially the only attorney working on the investigation, by May 2005, three additional attorneys were assigned to the matter. For no apparent reason, Mr. Aguirre was disrespectful and abusive to them. He attacked them in emails and badgered them on minor issues. Several times he accused his colleagues of thwarting his progress. Mr. Aguirre became angry and abrasive whenever an investigative decision was made that he did not agree with, yet on at least one occasion the same idea he rejected dismissively when made by another attorney became an idea Mr. Aguirre later presented as his own. In early July 2005, he told me that he could no longer even talk to Mark Kreitman, our group's Assistant Director.

Mr. Aguirre was a hard worker, but as time went on, I became increasingly concerned about his reliability. On two occasions, Mr. Aguirre angrily left the building during the workday after disagreements with other attorneys. Both times he said he was leaving to think about what he was going to do, which I understood to mean that he was planning to leave the Commission. Mr. Aguirre formally tendered his resignation in July 2005, but some time thereafter he withdrew that resignation. Then he said he was willing to work to complete the investigation but would not document his findings, which was essential to completing the investigation. It became apparent that Mr. Aguirre was a significant risk to leave at a moment's notice, regardless of the impact such action would have on the investigation.

Mr. Aguirre was not mindful of Commission policies and procedures. He misrepresented Commission policy to opposing counsel. Several subpoenas he issued had to be recalled because they were improperly issued in violation of federal law and Commission policy concerning electronic communication subpoenas. After Mr. Aguirre was terminated, his files were found to be so disorganized that it was difficult to determine which subpoenas he had actually issued.

It was extremely difficult to communicate with Mr. Aguirre, either verbally or in writing, and miscommunications were common. Information that Mr. Aguirre presented as fact often turned out to be mere speculation based on fragments of information that did not reflect reality. He bombarded me and others with hostile emails that were lengthy, difficult to follow, and often repetitive.

In June 2005, I prepared written evaluations and merit pay recommendations for all of the staff I supervised, including Mr. Aguirre. It is important to note that his evaluation was based on his work for the final three months of that period, from the date Mr. Aguirre joined my group, through April 30, 2005. In my written evaluation of Mr. Aguirre, I highlighted his high energy level and the long hours he put in on the investigation. In making my recommendation to the SEC compensation committee, I indicated that Mr. Aguirre had made "contributions of high quality." I did so because I wanted to reward Mr. Aguirre for his hard work.

We never gave Mr. Aguirre his written evaluation because he was out of the office when we began distributing the evaluations in late August 2005. Had we given Mr. Aguirre his evaluation, we would have also told him about the serious concerns we had with his behavior. Those concerns were included in a supplemental evaluation Mr. Kreitman and I wrote on August 1, 2005. We drafted a supplemental evaluation after Paul Berger, the Associate Director on the investigation, suggested we consider preparing one after asking me whether Mr. Aguirre's evaluation accurately reflected his workplace behavior. I told him it did not and we then drafted a supplemental evaluation that identified a number of serious deficiencies in Mr. Aguirre's workplace behavior.

Testimony of Mr. Mack

In or around May 2005, the Pequot investigation began focusing on Pequot's trading in two securities in July 2001. On July 30, 2001, it was publicly announced that General Electric ("GE") had acquired Heller Financial ("Heller"), causing a sharp rise in the stock price of Heller and a small decline in the stock price of GE. Pequot began accumulating Heller stock on Monday July 2, 2001 and started selling short GE stock on July 25, 2001. By closing out these positions after the merger announcement, Pequot realized a profit of nearly $17 million on Heller and approximately $1.9 million on GE.

During the summer of 2005, Mr. Aguirre became obsessed with whether Mr. Mack provided Arthur Samberg, the head of Pequot, with inside information about the merger between Heller and GE ahead of the public announcement. Credit Suisse First Boston ("CSFB"), an investment banking firm and an adviser to Heller in the transaction, hired Mr. Mack as its CEO on July 12, 2001, ten days after Pequot began to buy Heller stock. Mr. Aguirre speculated that Mr. Mack may have received information concerning the merger from CSFB before he joined the firm. Alternatively, he speculated that Mr. Mack may have received the information from Morgan Stanley, which advised GE on the transaction.

Despite a lack of concrete evidence, Mr. Aguirre insisted that Mr. Mack had tipped Mr. Samberg about the merger. He was extremely anxious to take Mr. Mack's testimony, so much so that I grew increasingly concerned that his desire to take Mr. Mack's testimony stemmed from Mr. Mack's high profile status, not an objective assessment of the facts. In emails, Mr. Aguirre claimed that Mr. Mack was the only person who met the profile of the tipper, a highly suspect and illogical conclusion. My concern was heightened because Mr. Aguirre wanted to take Mr. Mack's testimony immediately, before gathering

documents from CSFB that could shed light on whether Mack had received information about the merger before he joined CSFB. Moreover, Mr. Aguirre misrepresented several facts that he claimed linked Mack to the trading.

Along with these issues, I became concerned that Mr. Aguirre was potentially abusing his government authority when, after he took Mr. Samberg's testimony in June of 2005, it was reported to me that Mr. Aguirre behaved unprofessionally and was extremely disorganized during the testimony. As I learned that more and more of the information that Mr. Aguirre provided me was inaccurate or unsubstantiated and as I saw him display poor judgment in his dealings with other members of the team and with defense counsel, I began doubting that Mr. Aguirre was capable of objectively and professionally conducting this investigation. All of these events convinced me that it was important for me to understand exactly what evidence there was that Mr. Mack was the tipper before compelling his testimony.

Although I had no idea who would represent Mr. Mack if we called him to testify, I knew he would retain experienced SEC counsel who would likely, as is not uncommon, directly contact my superiors about the testimony. Accordingly, consistent with my general practice, I made Mr. Kreitman aware that we were considering taking Mr. Mack's testimony. I explained this practice to Mr. Aguirre, perhaps inartfully choosing the words "juice" and "political clout" to describe the fact that any influential counsel Mr. Mack chose could easily pick up the phone and call my supervisors about the case and I wanted them to be fully aware of the facts before answering any calls. I certainly did not intend to shy away from questioning Mr. Mack because of his power and influence -- quite the contrary.

Investigation after Mr. Aguirre's Termination

Starting in September 2005, the staff began focusing on identifying other potential tippers who may have provided Mr. Samberg information about the GE/Heller transaction and pursuing other aspects of the investigation. With respect to the GE/Heller transaction, the staff reviewed information to identify whom Mr. Samberg met with at the time of Pequot's trading. The staff also obtained from Pequot a list of people hired in 2001 and identified several people on that list who had connections with GE, Heller, or broker dealers involved in the merger. The staff reviewed thousands of emails obtained from Pequot to identify other potential tippers. The staff then compiled information about each person identified, including searching for relevant documents in the database of emails provided by Pequot.

When this research was complete, the staff evaluated whether to take the testimony of any of these potential tippers. The staff determined that, while it had identified people with significant connections to Pequot or Mr. Samberg or both, there was no evidence that any of them knew about the merger in advance of its public announcement. Conversely, those who knew about the deal did not have sufficient connection to Pequot and/or contact with Samberg or Pequot during the relevant time period. Thus, the staff had identified a large number of potential tippers, but no likely tippers. At this same

time, around December 2005, the focus of the investigation shifted to other Pequot trades and trading practices, where it remained until June 2006.

From December 2005 through June 2006, the investigative staff took testimony from or interviewed multiple individuals, issued subpoenas and made informal document requests, reviewed and analyzed thousands of documents, and participated in two proffer sessions with the Federal Bureau of Investigation and the office of the U.S. Attorney for the Southern District of New York. At the end of March 2006, the staff obtained four-month tolling agreements from Pequot and Mr. Samberg, which applied to all matters under investigation.

Beginning in June 2006, the staff considered whether to take any additional investigatory steps regarding the GE/Heller trading. One consideration was the harm Mr. Aguirre had caused, by taking this confidential, non-public investigation public for his own purposes, and the need to maintain public and investor confidence in the work of the Division of Enforcement. Ultimately, the staff took the testimony of several more witnesses. Each was questioned at length and each produced subpoenaed documents. On August 1, 2006, the staff took the testimony of Mr. Mack.

Recently, the decision was reached to close the investigation without taking any action. This decision was based on the evidence and, to my knowledge, nothing else.

Conclusion

In closing, I hope I have shed some light on the Pequot investigation and on Mr. Aguirre's unfounded allegations. While at the SEC, every investigation I have ever worked on has been conducted with fairness, diligence, and integrity. We did so in the Pequot investigation.

Thank you. I would be glad to answer any questions you may have.

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December 4, 2006

BY OVERNIGHT MAIL & ELECTRONIC MAIL

Hon. Arlen Specter, Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510
Attn: Hannibal G. Williams II Kemerer

RE: Hearing of the Senate Judiciary Committee on "Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity"

Dear Chairman Specter:

I am writing to submit brief remarks in connection with the Judiciary Committee's upcoming hearing examining illegal insider trading and hedge fund activity and the reform legislation that you are proposing in Congress and the Committee. I submit these comments as counsel to the Alliance for Investment Transparency ("AIT"), on whose behalf I testified at the Judiciary Committee's June 28, 2006 hearing concerning "Hedge Funds and Independent Analysts: How Independent are Their Relationships?" The AIT is a group of concerned companies who have joined together in an effort to highlight the lack of transparency and disclosure in certain areas of the financial markets.

The upcoming hearing, together with the Committee's recent hearings on related issues, serves to focus much-needed attention on the critical issues confronting this country's capital markets. In particular, we appreciate that the Committee has recognized the improper and undisclosed influence

that certain market participants wield in the financial markets, and the criminal activity that such influence can foster. This recognition is reflected in the details of the important legislation that you are proposing, and which the AIT generally supports in concept. We very much appreciate your leadership, and that of the Committee, on this issue.

The Committee's current focus on the improper use of non-public information by certain market participants, including some hedge funds, sheds light on an area in which market power and influence are abused. "Insider trading" is not a problem that is limited to improper trading in non-public information that is obtained from issuers or company personnel. There is, in fact, an equally serious and perhaps more insidious problem that has received far less attention, and that is the trading in material non-public information that is generated by market participants other than issuers -- specifically, by securities analysts, the investment banking and brokerage community, the financial press and traders themselves. Each of these groups of market participants necessarily has, at times, direct access to non-public information concerning market-moving events. This can include such non-public information as (i) the timing and substance of analyst reports; (ii) the timing and substance of investigative articles and publications; (iii) non-public stock, option and derivative market activity; (iv) advance knowledge of debt and equity offerings; and (v) knowledge of the fact and timing of governmental and regulatory inquiries and investigations.

In each instance, preferred access to such information can provide an enormous advantage to a market participant who abuses his or her access to this information. Such abuse does not appear to be consistently and vigorously prosecuted. However, the cases that have been brought show the insidious nature of trading on such non-public information. Examples of prosecutions include one recent case in which conspirators were accused of infiltrating a printing plant in order to obtain advance copies of BusinessWeek magazine and, specifically, to trade on advance knowledge of market-moving articles that were

set to appear.[1] In another prominent insider trading prosecution, Anthony Elgindy was convicted in January 2005 of racketeering, conspiracy and securities fraud for using confidential government information obtained from the Federal Bureau of Investigation to manipulate stock.

However, these schemes were relatively simplistic; unfortunately, it appears that there are important and far more sophisticated and nuanced forms of insider trading that have not been consistently and vigorously investigated and prosecuted. For example, in many instances, certain hedge funds and other powerful market participants wield their influence over securities analysts to influence coverage and to gain advance knowledge of the timing and substance of forthcoming analyst reports. As the Economist has reported: "Some analysts admit that their hedge-fund clients press them to write reports in line with the funds' views. 'We have had hedge funds try to twist our arms to write reports a certain way. The pressure definitely exists,' says one." (The Economist, "Fair comment or foul? Hedge funds and equity research," April 1, 2006.) Similarly, The Wall Street Journal has reported that hedge funds "have become so large that increasingly, they are the marketplace. Their actions can cause enormous damage to other investors, not just their own" and that "hedge funds have become the life blood of the investment houses." "There is no denying the close relationship that now exists between the hedge funds and Wall Street, and the potential conflicts the connection raises." (Alan Murray, The Wall Street Journal, "Lawsuit shows how hedge funds need to open up for the markets," April 5, 2006.)[2] Ordinary investors and other less prominent customers of

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[1] See U.S. Securities and Exchange Commission, Litigation Release No. 19696, May 11, 2006; SEC v. Sonja Anticevic et al., 05 Civ. 6991 (KMW) (S.D.N.Y.).

[2] The financial press has regularly reported on the privileged access that hedge funds, including Steven A. Cohen's S.A.C. Capital, have to market-moving information from Wall Street. See, e.g., Marcia Vickers, "The Most Powerful Trader on Wall Street You've Never Heard Of," BusinessWeek Online (Jul. 21, 2003) (describing S.A.C.'s "superpowerful information machine" and S.A.C. motto "'try to get the information before anyone else'"); Jenny Anderson, "True or False: A Hedge Fund Plotted to Hurt a Drug Maker?" New York Times (Mar. 26, 2006) ("Money means access on Wall Street, so Mr. Cohen

Wall Street banks are not provided with such privileged access to market-moving information.

It is important that the appropriate bodies undertake a serious examination of the level of privileged access to market information and timing that broker-dealers give to their powerful hedge fund clients that they do not provide to regular investors. We are not aware of any widespread investigation into such practices, even though they are widely understood to occur in the industry. Indeed, the recent controversies over allegations of insider trading by certain hedge funds echo precisely what we believe you will find is not an uncommon practice in that industry, and demonstrates the need for vigorous investigations being targeted in that direction.[3]

Given this state of affairs, the AIT believes that the proposed legislation is a critical step forward in addressing pervasive wrongdoing in the capital markets. The AIT believes the proposed legislation would greatly strengthen the nation's insider trading laws, giving law enforcement a strong tool to combat the information-peddling that is rife in the markets. Preferred access to material non-public information is an insidious practice that is all too common in the markets, and the proposed provision would help to combat the increasing trend of market participants trading on such information.[4] Moreover,

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is often first in line for the best information, which is the most valuable commodity in the trading world.").

[3] One area in which prosecutions have been focused is insider trading in connection with so-called "PIPE" transactions. In such instances, short-sellers have relied on non-public information concerning private equity offerings to trade ahead of public disclosure of those deals. See, e.g., U.S. Securities and Exchange Commission, Litigation Release No. 19199, April 21, 2005; SEC v. Pollet, No. 05-CV-1937 (SLT/RLM) (E.D.N.Y.).

[4] One aspect of the proposed legislation that the AIT believes may warrant further consideration is the provision providing for "whistleblower" protection and allowing for the payment of "bounties" to those reporting illegal insider trading to the authorities. The AIT is concerned that these well-intentioned provisions could be subject to abuse by wrongdoers who have themselves been involved in insider trading but, once the wrongdoing is, or is about to be, exposed, attempt to cloak themselves with whistleblower protections in order to avoid prosecution. We respectfully suggest that the

focus on hedge fund policies and practices is long overdue. As an industry, hedge funds have become one of the primary forces in this country's capital markets. In spite of this, the activities of this powerful industry have remained almost completely veiled. The enhanced reporting and disclosure requirements that have been proposed will finally begin to provide the markets and investors with some of the information they need to make informed investment decisions and to help reestablish an even playing field for all market participants.

Transparency in the capital markets is one of the bedrock principles that has kept the nation's economy robust, and that transparency is essential to the integrity of the markets. In that regard, the AIT believes that there are other straightforward items that Congress and the Committee might consider addressing that would serve to greatly enhance market transparency and efficiency. First, certain reporting requirements for large investment managers, including managers of hedge funds, are inexplicably limited to the disclosure of "long" positions, permitting managers to hide from public view "short" positions in which they are seeking to profit from the decline in a company's stock price. This selective disclosure runs contrary to the openness that is a hallmark of our capital markets, and this secrecy substantially raises the opportunity for wrongdoing. Second, certain market participants who hold "short" positions in a particular company's stock have disseminated misleading negative information to regulatory agencies without disclosure of their interest in the decline of the companies' stock prices.[5] Tippers should be required to

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Committee consider whether this provision is necessary, and whether it should be focused to ensure that it is not used as a shield by those who should be subject to the full force of the law for their misconduct.

[5] Moreover, these companies have reported that the short-sellers have gone well beyond regulators, contacting directly the companies' rating agencies, business partners, lenders, underwriters and major shareholders in an attempt to spread negative, and often false, information about the companies; all without disclosing their interest in the decline of the companies' stock. Concerns about these issues have been raised by commentators (Alex J. Pollock, "Undisclosed Interests," American Spectator, May 24, 2006; Alex J. Pollock, "Financial Interest Disclosures Can Protect Markets from "Short & Distort" Manipulators," June 2, 2006) and advocacy

specifically disclose any financial interest that they have in the target company to any regulator or law enforcement official who they contact.

We appreciate the Committee's focus on these important issues relating to illegal trading on non-public information and hope that Congress and the Committee, together with regulators and law enforcement, continues to draw attention to these issues that are critical to the functioning of our capital markets. Illegal trading on non-public information threatens not only the companies who are targets of such improper trading, their investors and employees, but also strikes at the foundation of the financial system. If certain market participants are allowed privileged access to market-moving information -- and if they are permitted to profit from their access to that information -- public confidence in the financial markets will be greatly undermined and the markets in which so much of this country's wealth is concentrated will be at risk. We applaud the Committee's continuing efforts to address these issues.

Respectfully,

Marc E. Kasowitz

groups. The U.S. Chamber of Commerce wrote to the SEC Chairman this summer to express its members' concern with this issue (National Chamber Foundation Ltr. to Chmn. Cox, July 11, 2006).

Testimony Concerning SEC Personnel Matters

by Mark Kreitman
Assistant Director, Division of Enforcement
U.S. Securities and Exchange Commission

Before the U.S. Senate Committee on the Judiciary

December 5, 2006

Chairman Specter, Ranking Member Leahy, and Members of the Committee:

Thank you for the opportunity to address what I understand to be your concerns about a personnel matter involving a former member of my staff, and to answer any remaining questions you may have after the extensive interviews my staff and I have provided to your staff and the staff of the Senate Finance Committee.

Please let me first say that my colleague, friend, and branch chief Robert Hanson, also on this panel, is among the most dedicated public servants I have had the privilege to know, a person of unimpeachable character, honor and fierce dedication to our agency's mission to protect investors. Paul Berger, my former supervisor and mentor, is known far beyond our circle of professional colleagues for his zealous fair-minded enforcement of the securities laws during his 14 years at the Commission. Any suggestion that I, or either of these individuals, was moved in any way by political influence in our investigation that is the subject of your committee's inquiry has no basis whatever in fact.

I have been an Assistant Director in the Division of Enforcement for about three years. I supervise a staff that has, during my tenure, included between 10 and 15 attorneys. Previously, I was an Assistant Chief Litigation Counsel – a trial lawyer -- with the Division for about 16 years, and tried some notorious cases including the successful prosecution of First Jersey Securities and its principal Robert Brennan to a $75 million verdict. I've brought cases against a department head at a major New York law firm, the president of a Beverly Hills bank, the son of a prominent local banker, and numerous Wall Street luminaries. My reputation at the Commission, in the industry, and at the bar is hardly that of a shrinking violet intimidated by power, money, or anything else.

I've won some awards, including the Irving M. Pollak Award named for our first Division Director, the Chairman's Award for Excellence, and most recently, an award from the United States Attorney for the Southern District of New York for my participation in the repatriation and recovery for investors of $200 million of proceeds of fraud from the Isle of Man. I've been an Adjunct Professor in the Graduate Program at Georgetown Law School since 1999 and was named Charles Fahy Distinguished Adjunct Professor for the 2004-5 academic year. I'm a graduate of Yale College and Harvard Law School, where I was a Wasserstein Public Interest Fellow for the 2003-2004 academic year.

I have been a public servant for 26 of my 31 years of law practice, 19 of them at the Commission. I come from a family of lawyers and judges with a long commitment to legal ethics and public service. I am 56 years old.

Mr. Aguirre was a student of mine at Georgetown – an excellent student who participated actively in class. I supervised his Masters paper; when he decided to submit it for publication, I edited the draft, and it was published in several journals. We became friends and socialized together with our wives. That has made this entire episode particularly painful for me, and for my wife.

When Mr. Aguirre graduated from the Georgetown program, he had not practiced law for a number of years after leaving his California practice at a small firm doing work unrelated to the federal securities laws. He had no enforcement investigative experience and was unfamiliar with a closely supervised working environment like the Commission, where investigative zeal must be tempered by respect for the rights and legitimate interests of citizens, and where collegiality and mutual respect is the hallmark of our working environment. As I understand it, Mr. Aguirre applied unsuccessfully for employment at the Commission 22 times before being hired here in Washington, where he was assigned to another Assistant Director group as a staff attorney with a standard one year probationary period. Mr. Aguirre complained repeatedly and bitterly to me that his supervisors in that group were inexperienced and incompetent. I understand, however, that his supervisors attributed Mr. Aguirre's problems to his inability to accept supervision or work effectively with his colleagues. When an opening occurred in my group, Mr. Aguirre requested transfer to my group, I acquiesced, and he was granted that unusual accommodation. However, I refused his request for special treatment to be allowed to report

outside the chain of command directly to me. He brought the Pequot investigation with him.

Unfortunately, after several months, the difficulties Mr. Aguirre previously engendered recurred. He treated his colleagues with disrespect bordering on contempt, and refused to share with them details, strategy or tactics about the investigation in which he was involved. His investigation of Pequot was poorly thought out, disorganized, and sloppily documented. The files were in disarray. He was unable to fairly and impartially balance evidence against his preconceived conclusions or articulate his thinking in a linear fashion. He viewed all supervision, direction, even inquiry concerning his work as unwarranted intrusion.

Beginning in June 2005, he came to believe, primarily on the basis of speculation, that John Mack was the tipper in Pequot's trading prior to announcement of GE's acquisition of Heller Financial, and repeatedly and heatedly insisted that we subpoena John Mack for testimony immediately, before he had developed evidence that Mr. Mack had access to material nonpublic information, or indeed, any potentially inculpatory evidence with which to confront Mr. Mack. When his supervisors pointed out that premature testimony would almost certainly be a fruitless exercise in that case because Mr. Mack could simply deny any illegal activity or, in fact, any connection to the suspicious trading, Mr. Aguirre concluded this was evidence of a widespread conspiracy to thwart him and protect an individual no more significant or powerful than people we subpoena or take testimony from every day – including, during this same time period, a former United States Senator and a former high-ranking White House Official.

We asked Mr. Aguirre to summarize his reasons for taking Mr. Mack's testimony at that point in time in a memorandum, but I found his reasons unpersuasive. In his arrogance, he refused to accept the possibility that there could be a good faith difference of professional opinion as to the appropriate timing of and proper evidentiary foundation for the invocation of compulsory process, between a first year probationer and his immediate supervisors who had, among them, more than 40 years of Commission experience, Instead, he vociferously and baselessly challenged their good faith and integrity. Frighteningly, it appeared that Mr. Aguirre was pursuing a personal agenda bordering on vendetta, instead of a calmly reasoned fair-minded pursuit of the evidence. He focused single-mindedly on John

Mack, to the exclusion of other persons who, he acknowledged in his June 28 testimony before this committee, were equally likely potential tippers.

Toward the end of his tenure, Mr. Aguirre's behavior became increasingly unprofessional, irresponsible and erratic. He threw what can only be reasonably described as tantrums, storming up and down the halls in a furious crouch, and abruptly left the office without leave on a number of occasions. He resigned at least twice and, though he reconsidered and withdrew his resignations, refused to provide any assurance that he would complete his assigned work – necessitating that, despite severely limited resources, we double staff his investigation. Finally, Mr. Aguirre announced that he refused to write up the results of his investigation in the required lengthy and detailed Action Memo to the Commission seeking authority, if the evidence warrants, to bring a proceeding against wrongdoers. Mr. Aguirre's self-indulgent refusal to perform that difficult but essential task which, as he was the primary investigator on the case, would be difficult and inefficient for another attorney to undertake, was, for me, the last straw.

Mr. Aguirre was terminated, as the notice given him stated, for "demonstrated inability to work effectively with other staff members and your unwillingness to operate within the Securities and Exchange Commission process." The decision to recommend that Mr. Aguirre be terminated during his probationary period was, despite the problems he had caused, a very difficult one for me.

I've heard – and read – a good deal about the two step increase we recommended for Mr. Aguirre which became effective shortly before his termination. That recommendation covered the rating period that ended April 30, some four months prior. Perhaps in retrospect it was too generous. He was a new member of my group. He worked an enormous number of hours with furious energy. I was anxious to encourage and help him to adjust after a troubled beginning. And, as I advised your staff, rating him unacceptable in any of the critical performance elements would almost certainly ensure his termination at a time I still hoped he could work out. Mr. Aguirre's subsequent behavior however so far exceeded the bounds of acceptable professional conduct that it was incumbent on me and his other supervisors to supplement his overly generous evaluation. A copy of our supplemental evaluation, prepared on August 1, 2005, which accurately described concerns we had about Mr. Aguirre's conduct, is attached.

Because Mr. Aguirre was vacationing in California during the last few weeks of his tenure, he did not receive this supplemental evaluation contemporaneously.

I believe the most serious concern raised in this inquiry has been the possibility of political influence distorting the Commission's investigation of fraud in the securities markets. I have seen no evidence whatever of such a thing. I can say categorically that no such thing influenced the conduct of Mr. Aguirre's investigation, supervision, or termination. Nor did it influence the decision not to take testimony from John Mack while Mr. Aguirre worked at the Commission. The Pequot investigation was pursued with vigor and professionalism after Mr. Aguirre departed the Commission, despite his leaving the files in a state of disarray. Ultimately, after all reasonable leads were exhausted and the relevant individuals were questioned and documents examined, the investigation was recently closed with no action taken.

I'd be pleased to answer any questions you may have.

Attachment

Evaluation of Gary Aguirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chef, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Department of Justice

STATEMENT

OF

RONALD J. TENPAS
ASSOCIATE DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"EXAMINING ENFORCEMENT OF CRIMINAL INSIDER TRADING AND HEDGE FUND ACTIVITY"

PRESENTED ON

DECEMBER 5, 2006

STATEMENT
OF
RONALD J. TENPAS
ASSOCIATE DEPUTY ATTORNEY GENERAL
SENATE JUDICIARY COMMITTEE
DECEMBER 5, 2006

"Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity"

Good morning Chairman Specter, Ranking Member Leahy, and members of the Committee. Thank you for inviting the Department of Justice to testify today concerning its views on the draft bill you have shared with us, entitled the "Criminal Misuse of Material Nonpublic Information and Investor Protection Act of 2006."

As I noted in my testimony before this Committee in September, the Department and the Corporate Fraud Task Force are committed to maintaining fairness and integrity in the marketplace by ensuring that individual investors are able to invest their hard-earned dollars without fear of being taken advantage of by those – whether they be corporate officers, members of the financial services industry or others – who improperly use inside information to enrich themselves at the expense of others. I know that I speak for the Task Force membership in extending our appreciation to this Committee for its thoughtful examination of the issues presented by insider trading and the parallel proceedings that are often used to investigate such conduct.

As discussed at your last hearing, while the Department of Justice and the SEC frequently investigate the same misconduct, the remedies which each of our agencies bring to bear vary, with the SEC pursuing civil remedies and the Department of Justice responsible for criminal prosecutions. Thus, I will focus my remarks on the bill's criminal provisions and

the effect those provisions would have on our criminal enforcement tools. More particularly, I would like to present our preliminary thoughts on some of the overarching problems the bill seeks to address, while also discussing examples of specific concerns we have identified that we think warrant additional attention. In general, we welcome the overall thrust of several of the criminal provisions, although we have a number of specific concerns about language in the bill and whether that language will effectively accomplish its apparent purposes. I want today to give you some illustrative examples of these concerns in the hope that we can work with you in a more detailed fashion moving forward so that any legislation achieves our shared goals of clarifying the legal responsibilities of insiders and supporting our corporate fraud enforcement efforts.

I would like to start my discussion with Section 4 of the bill. This section would amend Title 18, Section 1348 by adding a new subsection (b) that expressly prohibits insider trading. When I testified in September, I noted challenges we face in prosecuting insider trading but explained that despite various hurdles, the Department has enjoyed consistent success in prosecuting those who seek to exploit their access to information at the expense of the market. I described examples of our cases, which involve all types of defendants, from corporate officers, directors and employees who traded the company's securities after learning of significant confidential corporate developments, to friends, family members, and other "tippees" who traded the securities after receiving inside information.

Nevertheless, we believe it could be helpful to put "inside trading offenses" on a firmer statutory footing than they now stand, which is as a judicially-recognized species of Title 15 offenses that prohibit schemes to deceive associated with the offering and sale of

securities. The fact that the detailed elaboration of the elements of this offense have emerged largely through judicial decision-making has produced some degree of uncertainty for our prosecutors and for others for whom clarity in this area is important.

Yet, while we agree with the underlying premise of this section, we have a number of concerns about the specifics reflected in the bill. For example, this section is entitled "Willful misuse of material nonpublic information." As you know, in the criminal law, "willful" has a very particular meaning and imposes the highest burden on prosecutors with respect to the "state of mind," or "scienter," we must establish for a criminal defendant. Yet, despite the section's title, the various subsections of the bill contain a variety of other "scienter" standards – the new paragraph (b)(2)(1)(A) incorporates a "knowingly" standard, while paragraph (b)(2)(1)(B) provides no explicit scienter requirement, not even "knowingly." We would like an opportunity to work with you on developing a consistent approach that fairly penalizes wrongdoing but which does not unfairly ensnare the innocent actor.

I also observe that new subsection (b) as currently worded introduces at least two substantial changes from current law. First, it eliminates the element that the person who is charged with insider trading be shown to have a "duty" with respect to that information. We are concerned that eliminating this requirement potentially subjects to criminal sanctions those who innocently come by valuable information and trade on it. Thus, it may extend criminal liability more broadly than is warranted. Conversely, the draft bill essentially adds an affirmative defense that trading on inside information is acceptable if that information was "*gained by. . . research and skill.*" We are concerned that, while this may not be the intent, such a formulation will make it more difficult to prove insider trading than is the case under

current law. In addition, we are concerned that the phrases "research and skill," "of a specific nature" and "significant factor" may impose burdens we do not currently face, or may be insufficiently precise to provide the notice function normally required of a criminal statute and thus will present real difficulties of proof at trial and in formulating jury instructions. Thus, we think it might be helpful for the Committee, as a better model, to look to the definition of insider trading that the SEC has already promulgated through its regulatory process and to build from that if any adjustments are necessary. We would be happy to work with the Committee in any such effort.

Further on in Section 4, paragraph (c) contains a variety of provisions. Again, we find much to applaud in terms of the general thrust, but are concerned with various specifics. In general, we welcome the effort to make clear the Department's authority to investigate insider trading offenses and to do so in a manner that involves express coordination with our partners at the SEC. As you are aware, recent court decisions have, unfortunately, created potential barriers to the conduct of parallel investigations by the Department and the SEC, which are so important to the efficient, targeted and expedited resolution of these complex cases. And one of those decisions, *United States v. Stringer*, the United States has appealed to the Court of Appeals for the Ninth Circuit. It is unclear to us to what degree the lower court's decision in *Stringer*, which rested at least in part on constitutional grounds, is likely to be embraced, rejected or expanded by the Court of Appeals. Thus, we would urge that any final decisions on how to respond should be made only after that Court has issued its opinion, so that we may carefully assess the degree to which legislation can respond to the appellate court's rationale and insure that any legislation provides as comprehensive a fix as possible.

In addition, even as currently drafted, there are several aspects of the bill we would like to work with you further on. For example, the language of subsection (c) may result in some unintended consequences because paragraph (1)(A) of subsection (c) restates plenary authority to investigate, an authority we believe falls to the Attorney General generally as to all federal criminal violations. We are always cautious when we see language restating authority we believe already exists. Such language may be cited as evidence that the authority did not exist prior to this revision, or that a prior authority has been altered because the language of the revision does not identically track the pre-existing language found elsewhere. Thus, it may simply be best to remove this language, although again, this is something we would like to discuss more fully.

Similarly, proposed paragraph (c)(2) of revised section 1348 would provide that neither the Attorney General nor any other Federal agency would have a duty to disclose any investigation or to disclose any contacts made with a companion agency to "request or receive evidence," except pursuant to a court order issued on good cause shown that the sole basis for a civil investigation is to assist in a criminal investigation. We appreciate the intent of this provision to clarify an area of the law which has been made more murky by recent court decisions such as *Stringer*. We are concerned, however, that this revision may be too narrow. For example, we have traditionally coordinated our efforts with the SEC through steps more than just "requesting or receiving evidence." Thus, this language might be argued to cut-back on, rather than confirm, the propriety of our traditional coordination efforts with the SEC. Similarly, the language in (c)(2) applies only to investigations of violations of "this section", *i.e.* Section 1348 of Title 18. Yet, we continue to have parallel proceedings involving the SEC that involve other criminal provisions of Title 18 and Title 15, which

could equally be frustrated by these court decisions. Thus, (c)(2)'s limitation in coverage to Section 1348 might be read as an intention to disallow consultation in such other matters.

Let me turn now to Section 5, a section to create incentives for private citizens to report and assist in the investigation of insider trading. We always welcome the assistance of private citizens and whistleblowers who report criminal acts or other violations of laws. These reports often reveal wrongdoing which would have otherwise gone undetected. One example of this with which the Committee is familiar is the civil False Claims Act, which provides for monetary awards to successful plaintiffs who initiate a civil *qui tam* proceeding on behalf of the United States.

We are concerned, however, about replicating such a reward statute with respect to criminal proceedings. Giving such substantial financial incentives to individuals to make criminal allegations would be a fairly dramatic departure from past practice in the criminal arena. Thus, we would like the opportunity to think further about whether such a step would on balance be a net positive or negative for our enforcement efforts. Such incentives may produce not only meritorious allegations that are helpful to the government but also false allegations that could result in individuals being falsely accused. In addition, such incentives could be expected to become important grist for impeachment of a key government witness in a criminal trial, perhaps hurting our efforts to prosecute matters successfully. Also, it is unclear to us whether the factors that the statute indicates should be considered in fashioning a reward amount are meant to be exhaustive or only illustrative. One factor that is missing, but which strikes us as potentially quite important, is whether the person providing the information was himself complicit in the crime. Finally, we are reviewing whether the

reward scheme conflicts with the Justice for All Act and would impinge on our associated efforts to insure that victims are made whole through restitution, as well as detract from our traditional use of criminal fines to support the crime victim's fund.

Finally, a short comment regarding Section 6, which would create new regulatory requirements for hedge funds, including civil penalties, and which the SEC and the Department would have joint enforcement authority over. As I noted at the outset, the Department and the SEC have well-established roles with regard to our securities markets. The SEC has, over the years, developed considerable expertise in promulgating detailed regulatory requirements and enforcing such regulations through civil enforcement action. Thus, we believe it would be a mistake at this stage to tamper with that scheme, and to extend such enforcement duties to the SEC and Department of Justice jointly. We believe it best if the Department "sticks to its knitting" and continues to focus on criminal enforcement, with the SEC having sole authority in the civil arena.

Conclusion

In closing, let me again thank the Committee for its continuing interest in our corporate fraud enforcement efforts, and its interest in insuring that we have the tools necessary to perform effectively. We remain committed to combating all threats to the integrity of our capital markets and to the welfare of the investing public, as we know you do. Thus, we look forward to working with you to address some of the matters of concern that I have raised, both today in this hearing and beyond. Thank you.

TESTIMONY
OF

LINDA CHATMAN THOMSEN, DIRECTOR
DIVISION OF ENFORCEMENT
U.S. SECURITIES AND EXCHANGE COMMISSION

CONCERNING
INSIDER TRADING

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

DECEMBER 5, 2006

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Testimony Concerning Insider Trading

by Linda Chatman Thomsen
Director, Division of Enforcement
U.S. Securities and Exchange Commission

Before the U.S. Senate Committee on the Judiciary
December 5, 2006

Chairman Specter, Ranking Member Leahy, and Members of the Committee:

Thank you for inviting me to testify today about insider trading involving hedge funds. Our laws against insider trading play an essential role in protecting our securities markets and in promoting investor confidence in the integrity of those markets. Rigorous enforcement of our current statutory and regulatory prohibitions on insider trading is an important part of the Commission's mission.

I am especially pleased to testify together with Associate Deputy Attorney General Ronald Tenpas of the United States Department of Justice, and Richard Blumenthal, Attorney General of the State of Connecticut. The Commission, as you know, is a civil enforcement agency and we use civil sanctions to address insider trading. However, insider trading may also violate federal criminal law, as well as state securities regulations and other state laws. The respective histories of the SEC and the Department of Justice, as well as those of state attorneys general and securities regulators, demonstrate our collective commitment to prosecuting insider trading, civilly and criminally, under federal and state law. Our respective histories also demonstrate our collective commitment to working with each other.

Proving An Insider Trading Case

When I last appeared before this Committee a few months ago, I noted that insider trading by hedge funds was an area of significant concern to the Commission, the Enforcement Division, and this Committee. Insider trading by hedge funds remains a substantial concern to the Division, and represents a significant focus of our current enforcement efforts. As suggested by your staff, I will discuss the process we follow in bringing insider trading cases in general, and also speak to cases involving insider trading by hedge funds.

Over the years, investigating and prosecuting insider trading violations has remained a central and important element of our enforcement mission. The Division pursues these cases day in and day out, and has developed unparalleled expertise in this area. Basically, the staff must prove that a trade was made on the basis of material, non-public information, with the requisite intent to violate the law, and that the information was used or obtained in violation of a duty to the source of the information. That's quite a mouthful, even for a lawyer, so it may be helpful if I describe in more detail, the three

key legal requirements that must be met for the SEC to bring a civil insider trading case, which are:

1) access to material, non-public information;

2) scienter (or culpable intent); and

3) breach of a duty to the source of the information.

Before I detail these legal requirements, however, let me step back and discuss some background regarding our insider trading investigations. Insider trading leads come from a host of sources, not only market surveillance but also the media, public tips, and information developed in our own inspections and investigations. Identifying suspicious trading is an essential starting point, but it is only the first step in compiling a viable case. While the SEC's Enforcement Division has brought hundreds of successful insider trading cases, there are also many investigations that are opened and later closed without enforcement action. We may open an investigation based on suspicious trading and all of the circumstances may look troubling, but after a thorough look, we may discover no evidence of insider trading or not enough evidence to prove there has been a violation of law. Because an investigation may not lead to an enforcement action, we are always mindful that public disclosure of the mere fact of an SEC investigation may unfairly impugn the reputations of the entities and individuals whose conduct may be exonerated. For this reason, as a matter of long-standing Commission policy, our investigations are conducted on a confidential basis and, as a general matter, we do not confirm or deny the existence of any ongoing investigations.

One of the challenges in successfully prosecuting insider trading is that so much of the relevant activity—trading—is legitimate and must be protected. Trading based on one's own research and financial acumen or strategies is not only legitimate but encouraged. The problem arises only when trades become unlawful because they are based on material non-public information obtained through a breach of duty to the source of the information.

As the law of insider trading has developed over time, it has come to impose legal requirements intended to distinguish legitimate conduct from illegitimate conduct. As I mentioned a moment ago, the law requires that the information be confidential and non-public. If so many people already know the information that it crosses the tipping point where it can be deemed public—based on prior media reports, for instance—there is no violation. The staff must also show scienter—a culpable state of mind or intent to violate the law. In other words, the tipping or trading must be undertaken with culpable intent to commit a violation, and not as the result of an inadvertent slip or innocent mistake. Finally, the staff must also show a violation of duty to the source of the information. The duty to the source may be easy to prove against a tipper who passes on information in breach of a confidentiality agreement. But if information is passed along a chain of tippees, it may become harder to prove that a trader who obtained the information third- or fourth-hand had any duty to the source, or knowledge of the original tipper's duty to the source. Though each of these legal requirements must be established in every insider

trading case, they are important because they help to distinguish unlawful trading from the much larger universe of lawful trading.

Insider trading can be, and usually is, accomplished within a very small group or even by a single individual. The communications that result in insider trading do not necessarily generate much of a paper trail. The executive working on due diligence for a confidential deal may meet his brother-in-law in a public park on his lunch hour and pass along a tip. Because there are so few people involved, there may not be witnesses or bystanders who will come forward and report the tipping. Moreover, those who know about the tip may become participants in a scheme because the potential (though illegal) rewards are enormous.

Despite these challenges, our staff has become particularly adept at sifting through all available forms of evidence, including phone records, emails, instant messages, and the electronic footprints of internet protocol data. Our staff culls through trading records, interviews and takes the testimony of witnesses, and reviews bank and brokerage statements. With these tools and resources, our staff has built solid, credible enforcement actions against hundreds of wrongdoers.

Proving Insider Trading In the Context of Hedge Funds

Investigating potential insider trading by hedge funds presents additional challenges because of their high volume trading and proprietary trading strategies. Because they often have substantial assets under management, hedge funds may place extremely large trades in many different securities on a daily basis. The huge volume of trading by hedge funds across a broad range of securities may generate any number of transactions that appear to be unusual or suspicious, but for some hedge funds these trades may be typical. When the SEC approaches a hedge fund with evidence of a large and suspicious trade in advance of a public announcement by a company, the hedge fund often replies that it placed trades of the same magnitude in the same security on many different occasions—and the trading records generally support that claim.

Tracking a hedge fund's trading in a specific security may also be challenging. It is not uncommon for hedge funds to use the services of multiple prime brokers—registered broker-dealers that facilitate trades and other transactions on behalf of hedge funds. A hedge fund may break up a single large trade into many smaller trades to be facilitated through a number of prime brokers over time because, for example, the hedge fund may want to make its trading less obvious in the market, often to protect its proprietary trading strategy. Thus, to develop an accurate composite view of a hedge fund's trading in a particular security, it may be necessary to review records from all of its prime brokers.

The prime brokers provide the SEC with a window into the trading activities of the hedge funds they serve, but it is admittedly a limited window. While a prime broker has information about the transactions it performs for a hedge fund, it generally has little information about activities the hedge fund may be conducting through other prime brokers. Nonetheless, the Enforcement Division remains optimistic about prime brokers as a source of leads regarding unlawful insider trading.

While the SEC has access to the trading records of prime brokers and receives referrals from the SROs regarding suspicious trading executed through their markets, the available documents are generally organized according to the security involved in the suspicious transactions (e.g., XYZ Company), not the identity of the trader. Similarly, the SROs' surveillance systems are set up to trigger alerts based on aggregate trading parameters regarding a particular security, and not based on the identity of the trader. A referral from an exchange usually identifies the issuer of the security involved (which might have announced a merger or other major transaction) and a list of identified traders, which may include one or more hedge funds or accounts trading on behalf of hedge funds. As a result, referrals about suspicious trading by a particular hedge fund appear like random puzzle pieces, but whether the pieces are part of a larger pattern is far from obvious. One SRO may report suspicious trading in a security by a specific hedge fund, among other traders, on one day, while another SRO may report suspicious trading in a different security by the same hedge fund, again among other traders, on a different day. The SEC presently does not have an electronic system to aggregate referrals based on the identities of the specific traders involved, but we anticipate implementing a new case tracking system by mid-2007 that will enable us to compile all referrals from different exchanges and different time periods by trader.

The identification of suspicious trading and resulting referrals are only the start of the necessary detective work by the SROs and the SEC. The SEC and the SROs gather and analyze the trading records and survey employees of the issuer about any relationship or association they may have with a list of known traders. The objective is to eliminate traders who did not have access to inside information, and more importantly, to establish links between known traders and potential sources of inside information. In the course of an enforcement investigation, the staff's search for access to inside information is meticulous, time-consuming, and sometimes proves to be inconclusive, but all potential leads are carefully considered and examined.

The SEC's Investigation of Potential Insider Trading by Pequot

I know our investigation of potential insider trading by a well-known hedge fund, Pequot Capital Management, has piqued the Committee's interest. A former SEC attorney has alleged that the investigation was impeded and the attorney was terminated because he sought to take testimony from a prominent individual. Speaking for the Division of Enforcement, I want you to know that these allegations are simply not true.

Although it is uncomfortable to discuss an individual's job performance in detail in a public setting, the former SEC employee's false allegations against the Enforcement Division have made the facts surrounding his termination a public issue. Therefore, I feel compelled to share with you the Enforcement Division's perspective on his performance problems and his resulting termination. After an unhappy probationary period of employment, the former SEC employee was terminated on September 1, 2005 because of "his inability to work effectively with other staff and his unwillingness to operate within the Securities and Exchange Commission (SEC) process." The SEC's termination letter is attached hereto. When the staff attorney was hired, he was required to serve a one-year probationary or trial period during which his employment could be terminated for any

reason or no reason, but there were indeed many reasons in this particular case. He had continued personality conflicts with other staff attorneys, resisted standard supervision, and ignored the SEC's chain of command. Despite these problems, the SEC attempted to accommodate him and to ameliorate the problems he caused in his work groups. During his brief tenure, he was, at his request, transferred from his original supervisor to a supervisor he requested, about whom he now bitterly complains. He also requested, and received, official time to pursue an unsuccessful age discrimination claim against the SEC for failing to hire him on 22 prior applications. The EEOC's opinion denying those claims is attached; the former employee is appealing the decision.

During his tenure, the former employee demonstrated his own dissatisfaction with his employment by twice leaving the office abruptly during the workday after disagreeing with other attorneys, and on a third occasion, by actually tendering his written resignation, only to rescind it some time later. After assuming primary responsibility for the Pequot investigation for several months in 2005, the former employee announced he would not draft the customary memorandum summarizing the investigation he now so publicly discusses. With respect to the substance of his work, he issued – without his supervisors' review or approval – subpoenas that violated federal privacy law, which were withdrawn as soon as his supervisors learned of them. But for the corrective actions of his SEC supervisors, the staff attorney's work product could have been extremely damaging to the SEC, and his continued resistance to supervision created a substantial risk of future error. After the SEC expended considerable efforts in attempts to make the employment relationship work, we decided not to extend his employment beyond the one-year probationary period.

As to the potential insider trading matters at issue in the Pequot case, they were thoroughly investigated. The investigation was ultimately conducted in large part by staff other than the one former attorney who is now heard to complain and was continued long after he left the agency. Between February 2002 and April 2005, the Enforcement Division received a total of 15 SRO referrals regarding various transactions in which Pequot, among others, was identified as a trader. After preliminary screening by two senior supervisors, 13 of these transactions were forwarded on to enforcement staff for further review and consideration, including 10 that were forwarded to staff working on the Pequot investigation. The GE/Heller transaction investigated by the former employee was not the subject of an SRO referral, and our closing of the matter was consistent with the NYSE's original decision to close the matter in 2002. After reviewing the suspicious trading at issue, the NYSE decided not to refer the matter to the SEC for further investigation, but instead sent the Commission a closing memorandum dated January 30, 2002, for informational purposes only, noting that "the deal was expected and the size did not appear out of character." Although the SEC's Pequot investigation reviewed that transaction and many others, we did not find sufficient evidence to support an enforcement action. As a result, the investigation was closed by the Enforcement Division due to lack of evidence, and thus we will not be asking the Commission to take any further action. Because of the public attention this case has received, the Commission has authorized the Division to make its closing memorandum available to

the public, and it is attached to my testimony. I think you will find it a useful summary of the many hours of hard work that went into this investigation.

Finally, Mr. Chairman, the three supervisors working on the Pequot investigation, who collectively have decades of experience and who have been involved in some of our toughest cases, were not influenced by who any of the particular people involved in the investigation were, but rather by the facts and the evidence. This is consistent with the finest traditions of this agency. We follow the facts, and if those facts take us to John or Jane Doe or some more famous John or Jane, so be it. We have gathered evidence from and about, and in some instances we have sued, captains of industry, Presidential cabinet members, Members of Congress, and celebrities, as well as thousands of other far less well known people. Indeed, a long list of prominent and not so prominent individuals would undoubtedly testify that the Enforcement Division does not pull its punches. I want to assure the Committee that we are passionate about our work and will pursue it with vigor, skill and fairness.

That concludes my testimony. I would be glad to answer any questions you may have.

Attachments

ATTACHMENT 2

MEMORANDUM

VIA: Federal Express, Certified and First Class Mail

TO: Gary J. Aguirre

FROM: Linda Chatman Thomsen
Director, Division of Enforcement

DATE: September 1, 2005

SUBJECT: Notice of Termination During Trial Period

This is to inform you that your employment as a General Attorney (SI), Enforcement Division, will be terminated during your trial period based upon your demonstrated inability to work effectively with other staff members and your unwillingness to operate within the Securities and Exchange Commission (SEC) process. Your termination from the SEC and from the Federal service will be effective at the close of business on Friday September 2, 2005.

You began your employment with the Commission on September 7, 2004. As you were advised at the time of your appointment, an employee who is given a career conditional appointment, as you were, must serve a one-year trial period. It is during this time that an employee has to demonstrate fully his/her qualifications for continued employment.

Several times throughout your trial period, your supervisors advised you that your conduct was inappropriate. You were permitted to transfer from one Assistant Director group to another after assuring your Associate Director that problems that had occurred, including personality conflicts and resistance to standard supervision, would not recur. However, you have continued to have conflicts with other staff attorneys, your branch chief, and a Trial Unit attorney assigned to your primary case responsibility. You have continually expressed dissatisfaction with the supervisory structure and ignored the chain of command in the Division. On one occasion, you submitted (and later withdrew) your resignation to your Associate Director, and indicated that you were uninterested in participating in preparation of your primary case assignment beyond its investigatory stage. While your substantive work generally has been good, the problems that have occurred in other areas are so significant that they far outweigh the value of that work.

During the last several months, your Associate Director, your Assistant Director, and your branch chief have met with you on several occasions to explain to you the importance of working together with other staff members to achieve consensual goals and the importance of operating within the SEC process.

Since those meetings, your conduct has not improved to the level that warrants retention beyond your trial period. Therefore, your employment with the SEC will be terminated during your trial period, effective September 2, 2005 at 5:00 p.m., in accordance with the provisions of 5 CFR 315.804.

I have reviewed the situation with your supervisors, and this decision represents the consensus reached among them. You may appeal this action to the Merit Systems Protection Board (MSPB) only if you believe it was based on partisan political reasons or marital status. Any such appeal must be submitted in writing, not later than thirty days after the effective date of this action, to the Merit Systems Protection Board, Washington, D.C. Regional Office, 1800 Diagonal Road, Suite 205 Alexandria, VA 22314-2480; e-mail: washingtonregion@mspb.gov.; Fax: (703) 756-7112. Appeal forms are attached. You can access the relevant regulations at www.mspb.gov.

If you have any questions about this notice or your rights, please contact Linda Borostovik, Human Resources Specialist, at 202-551-7871. Although she may not represent you, Ms. Borostovik is available to answer questions you may have regarding your attendant rights. In addition, we need to coordinate your obtaining personal items from Station Place and returning your laptop, token, identification badge, and office key. You may contact Chuck Staiger at 202-551-4990 to arrange to come into the office for your personal belongings and the return of Commission items or to use a courier service for this purpose.

Attachment: MSPB Appeal Forms

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
1801 L Street, N.W., Suite 100
Washington, D.C. 20507

Gary Aguirre,	)	
Complainant,	)	EEOC No. 100-2005-00413X
v.	)	Agency No. 155120631-48
William H. Donaldson, Chairman, U.S. Securities and Exchange Commission,	)	Date: June 14, 2006
Agency.	)	

DECISION

This Decision is being issued without a hearing, pursuant to 29 C.F.R. § 1614.109(g)(3) (2005). On June 28, 2005, I issued a Notice of Intent to Issue a Decision Without a Hearing (Notice). On July 13, 2005, the Agency issued a response to my Notice by filing a Motion for Summary Judgment Without a Hearing and Memorandum in Support. Complainant filed a Memorandum of Points and Authorities in Opposition for Summary Judgment, on August 15, 2005. The remaining procedural history is contained in the case file and the Investigative Report ("IR") and will not be reiterated. The record before me consists of the IR and the parties' submissions.[1]

[1] On August 15, 2005, Complainant filed a Declaration and Application for Extension of Page Length to Motion for Summary Judgment and Motion to Strike Inadmissible Evidence Offered in Support of Summary Judgment. Complainant's request for an extension of page length is **GRANTED**. Complainant's request to strike is **DENIED**.

On July 13, 2005, the Agency filed a Motion for Leave to File a Motion for Summary Judgment in Excess of Fifteen Page Limit. The motion is **GRANTED**. On August 25, 2005, the Agency filed an Opposition to Complainant's Declaration and Application for Extension of Page (continued...)

CLAIMS

Whether the Agency discriminated against Complainant on the bases of his race (Caucasian), National Origin (Hispanic), sex (male), and age (DOB: 03/07/40), when:

(1) the Agency failed to select him for the following Vacancy Announcements:

a. 03-268-SW
b. 04-034-DC
c. 04-077-MK
d. 04-083-DJ
e. 04-88-MB
f. 04-128-MK
g. 04-060-DP (re-posted as 04-154)
h. 03-256-TR
i. 04-069-DC
j. 03-206-DC
k. 03-208-DC
l. 03-251-DC
m. 04-076-DP;

(2) the Agency failed to select him for an SK-14 position in the San Francisco District Office, as advertised in the Legal Career Center's May 30, 2003 posting;

(3) the Agency failed to select him for a position in the SEC's Northeast Regional Office in response to the special application he submitted on March 1, 2004; and

(4) the Agency cancelled Vacancy Announcement 04-027-DP without filling the position.

FINDINGS AND ANALYSIS

A. THE GOVERNING LAW FOR SUMMARY JUDGMENT

The EEOC's regulations on summary judgment are patterned after Rule 56 of the Federal Rules of Civil Procedure, which provides that a moving party is entitled to summary judgment if

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[1](...continued)
Limit or in the Alternative, Agency's Motion for Leave to File a Reply to Complainant's Opposition to the Agency's Motion for Summary Judgment. The Agency requests are DENIED.

SEC 000138

there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. There is no genuine issue of material fact where the relevant evidence in the record, taken as a whole, indicates that a reasonable factfinder could not return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

B. FACTS

1. Complainant practiced law from 1967 until 1995.

2. Complainant was the senior partner in a small law firm from 1984 to 1995.

3. Complainant retired from active legal practice in 1995 to attend film school.

4. Subsequently, Complainant formed a film company and engaged in some part-time civil litigation consulting work between 1996 to 2000. The consulting work took 30% of his time.

5. In 2001, Complainant returned to law school and received an L.L.M from the Georgetown University Law Center.

6. Complainant applied for an SK-16 Senior Trial Attorney position with the U.S. Securities and Exchange Commission's (SEC) Midwest Regional Office, Vacancy Announcement No. 03-268-DW. The position was opened in October 2003.

7. The applications for the position were screened by a Human Resources (HR) Specialist, who decided not to certify Complainant as being minimally qualified. Thereafter, Complainant contacted the HR Specialist via telephone and after the conversation, she decided to forward Complainant's application to the selecting official for consideration.

8. Senior Associate Regional Director, Midwest Regional Office, and selecting official

for the position, Robert Burson (Caucasian, American/Irish/English, male, DOB: 4/26/54), selected two candidates for the position. Complainant was not selected.

9. Complainant applied for an SK-14, General Attorney position with the SEC's Securities Industry Division, Vacancy Announcement No. 04-034-DC.

10. HR received the applications for the position, screened them and certified sixty-four candidates, including Complainant, as being minimally qualified for the position.

11. James Clarkson (Caucasian, White, male, DOB: 3/1/42), Director of Regional Office Operations in Enforcement, the selecting official for the position, selected Francisco Medina from the certificate without conducting an interview. Clarkson interviewed Medina a few months before the vacancy announcement was posted for another position (not presently at issue) and invited Medina to apply for General Attorney position 04-034-DC.

12. Complainant applied for an SK-17, Supervisory Trial Attorney position with the SEC's Southeast Regional Office in Miami, Vacancy Announcement No. 04-077-MK.

13. HR received the applications for the position, screened them and certified thirteen candidates, including Complainant, as being minimally qualified for the position.

14. Associate Regional Director and selecting official, Glenn Gordon (Caucasian, American/Eastern European Descent, White, male, DOB: 6/5/61), reviewed the certificate and resumes and identified three candidates for interviews. Complainant was not selected for an interview. Gordon, Peter Bresnan and Teresa Verges interviewed the candidates. Robert Levenson was selected for the position.

15. Complainant applied for an SK-14, General Attorney position with the SEC's Fort Worth District Office, Vacancy Announcement No. 04-083-DJ.

SEC 000140

16. HR received the applications for the position, screened them and certified twenty-three candidates, including Complainant, as being minimally qualified for the position.

17. Associate District Administrator and selecting official, Spencer Barasch (Caucasian, American, male, DOB: 11/27/57), and other managers reviewed the certificate and identified applicants for interviews. Complainant was not interviewed.

18. Two individuals were selected for the position, Jennifer Brandt (Caucasian, female) and Jay Reddien (Caucasian, male). Reddien declined the offer and a third offer was extended to Jason Lewis (Native American, male), who accepted the offer.

19. Complainant applied for an SK-16, Senior Special Counsel position with the SEC's Division of Market Regulation, Washington, D.C., Vacancy Announcement No. 04-088-MB.

20. HR received the applications for the position, screened them and certified thirty-six candidates, including Complainant, as being minimally qualified for the position.

21. Associate Directors David Shillman (Caucasian, American, male, DOB: 9/9/60) and Elizabeth King (American, White, female, DOB: 12/31/66), the selecting officials, reviewed the applicants and identified eleven applicants for interviews. Complainant was not interviewed. John Roeser (Caucasian, male) and Michael Gaw (Asian, male) were selected for the position.

22. Complainant applied for an SK-16, Trial Attorney position with the SEC's Securities Industry Division, Vacancy Announcement No. 04-128-MK.

23. HR received the applications for the position, screened them and certified forty-five candidates, including Complainant, as being minimally qualified for the position.

24. Glenn Gordon, Robert Levenson (Caucasian, White, male, DOB: 11/12/57), and Christopher Martin (Caucasian, American, male, DOB: 10/27/70), were members of the

interview panel. Nine applicants, including Complainant, were interviewed by the panel.

25. Gordon was the selecting official for the position.

26. Complainant was not selected for the Trial Attorney position.

27. Complainant applied for an SK-12/13/14 Advisor position with the SEC's Securities Industry Division, Vacancy Announcement No. 04-060-DP.

28. HR received the applications for the position, screened them and produced a certificate for the Division of Corporate Finance for further consideration. Complainant was not included in the certificate.

29. The Attorney Advisor position was open only to SEC employees.

30. Complainant applied for an SK-16, Trial Attorney position with the SEC's Northeast Regional Office, Vacancy Announcement No. 03-256-TR.

31. HR received the applications for the position, screened them and certified sixty candidates, including Complainant, as being minimally qualified for the position.

32. Barry Rashkover (protected categories unknown), Associate Regional Director, was the selecting official.

33. Ten applicants were interviewed for the position.

34. David Markowitz was selected for the position.

35. Complainant applied for an SK-16, Trial Attorney position with the SEC's Enforcement Division, Washington, D.C., Vacancy Announcement No. 04-069-DC.

36. HR received the applications for the position, screened them and certified eighty-eight candidates, including Complainant, as being minimally qualified for the position.

37. A panel consisting of three members, Ken Miller, Suzanne Romajas, and Rick

Simpson, reviewed the certificate and referred seventeen applicants for interviews to the selecting official, Kornblau. Complainant was not referred to the selecting official for an interview.

38. Complainant applied for a Trial Attorney position, Vacancy Announcement No. 03-206-DC, with the SEC's Enforcement Division, in Washington, D.C.

39. Complainant was included in the Excepted Service Attorney Selection Certificate (certificate) for the position as being minimally qualified for the position.

40. The certificate listed one hundred and thirty-seven applicants as minimally qualified for the position.

41. A panel consisting of three Enforcement employees reviewed the certificate and interviewed twenty-two of the certified applicants, including Complainant.

42. Eight candidates were referred to the selecting official, David Kornblau (Caucasian, American, male, DOB: 4/18/61), Chief Litigation Counsel, Enforcement, by the panel. Complainant was initially not included. However, one of the panel members referred Complainant's resume to Kornblau, because he deemed it "unusual." IR, F-2 at 14.

43. All nine candidates were interviewed by Kornblau and Peter Bresnan (Caucasian, Irish/German/Hungarian/Jewish, male, DOB: 3/24/55), Deputy Chief Litigation Counsel.

44. Six candidates were selected for the 03-206-DC positions. Complainant was not one of the candidates selected.

45. Complainant applied for an SK-14, General Attorney position with the SEC's Securities Industry Division, San Francisco District Office (SFDO), Vacancy Announcement No. 03-208-DC.

46. HR received the applications for the position, screened them and certified nineteen candidates as being minimally qualified for the position. Complainant was not included in the certificate.

47. Robert Mitchell, Assistant District Administrator for Enforcement, selected Jina Choi for the General Attorney position. Mitchell knew Choi, therefore, she was not interviewed for the position.

48. Complainant applied for an SK-17, Supervisory Trial Attorney position with the SEC's Pacific Regional Office, Vacancy Announcement No. 03-251-DC.

49. HR received the applications for the position, screened them and certified twenty-one candidates, including Complainant, as being minimally qualified for the position.

50. Associate Regional Directors, Sandra Harris (Caucasian, Irish/German/Romanian/Dutch/Native American, female, DOB: 7/12/58) and Randall Lee (Asian, American, male, DOB: 8/15/61), identified seven applicants for interviews. Complainant was not selected for an interview.

51. Michael Piazza (Caucasian, male, over 40) was selected for the position.

52. Complainant applied for an SK-13/14, Attorney-Advisor position with the SEC's Securities Industry Division, Office of International Affairs, Washington, D.C., Vacancy Announcement No. 04-027-DC.

53. HR received the applications for the position, screened them and issued a certificate listing the applicants who were minimally qualified for the position. Complainant was not included in the certificate.

54. Complainant was not selected for the position.

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55. Complainant applied for a non-posted Staff Attorney position with the Northeastern Regional Office.

56. Complainant was interviewed by several employees in the office, including Christopher Castano (Staff Attorney), Bennett Ellenbogen (Trial Attorney) and Leslie Kazon. Complainant's file was forwarded to Deputy Regional Director, Edwin Nordlinger, for further consideration.

57. Complainant was not selected for a position.

58. On February 18, 2004, the Agency canceled Vacancy Announcement No. 04-027-DP, SK-16 Attorney-Advisor, Securities Industry, Division of Corporate Finance. The Vacancy Announcement was set to close on February 25, 2004.

59. Complainant is currently employed as an SK-14 Trial Attorney in the SEC's Division of Enforcement in Washington, D.C.

C. CONCLUSIONS OF LAW

To establish a *prima facie* case of disparate treatment in a nonselection case, a Complainant may show: (1) that he/she is a member of a group protected from discrimination; (2) that he/she applied for and was qualified for the position at issue; and (3) that he/she was rejected under circumstances which give rise to an inference of unlawful discrimination, *e.g.*, the Agency continued to seek applicants or filled the positions with persons who were not members of Complainant's protected group. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), n.13.

If a *prima facie* case is established, the burden shifts to the Agency to articulate a legitimate, non-discriminatory reason for the challenged action. *Texas Dep't of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 253-54 (1981); *McDonnell Douglas*, 411 U.S. at 802. Complainant may then show that the explanation offered by the Agency was not the true reason, but a pretext for discrimination. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804. The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant always remains with the Complainant. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

Although the initial inquiry in a discrimination case usually focuses on whether the Complainant has established a *prima facie* case, following this order of analysis is unnecessary when the Agency has articulated legitimate, nondiscriminatory reasons for its actions. *See Washington v. Dep't of the Navy*, EEOC Petition No. 03900056 (May 31, 1990). In such cases, the inquiry shifts from whether the Complainant has established a *prima facie* case, to whether he has demonstrated by a preponderance of the evidence that the Agency's reasons for its actions were merely a pretext for discrimination. *Id. See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-17 (1983). In this case, I find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions.

ARTICULATED NONDISCRIMINATORY REASONS

1. Vacancy Announcement No. 03-268-SW

Robert Burson, selecting official, indicated that he was looking for a candidate who could manage and conduct complex trials, who possessed practical knowledge of the securities laws, had excellent writing and pretrial skills, and exhibited strong interpersonal skills. Burson stated that he selected Thomas Szomba, based on his trial experience at SEC and the U.S. Attorney's Office as a federal prosecutor, and his success in trying complex securities cases. Burson also

stated that he selected Jarrett Becker based on his solid litigation experience, which included white collar criminal defense in the area of securities and non-securities. Burson also added that Becker had pre-trial and trial experience as first and second chair.

2. **Vacancy Announcement No. 04-034-DC**

James Clarkson, Director of Regional Office Operations in Enforcement and selecting official, stated that he selected Francisco Medina, a Hispanic male, for the position due to his superior qualifications. Clarkson indicated that he had previously interviewed Medina for another position and that he considered him a suitable candidate for the position in question. According to Clarkson the selectee had strong credentials, as he had previous experience working in two major law firms, possessed strong academic and professional backgrounds, and served as Associate General Counsel with Citigroup, Inc.

3. **Vacancy Announcement No. 04-077-MK**

Glenn Gordon attested that he was looking for a candidate who could be responsible for supervising the trial unit, demonstrated knowledge of securities laws, had strong writing and editorial skills, and could manage others. Gordon further attested that he did not select Complainant for an interview because his application did not show that he possessed the practical securities related experience necessary for the position. Gordon explained that Complainant's prior legal experience mainly dealt with state court, which is different from SEC's federal court practice. Gordon also indicated that Complainant did not possess the background and experience necessary to supervise other SEC trial attorneys. According to Gordon, the selectee had prior experience in the trial unit, had a strong background in securities law, possessed excellent writing skills, and had the ability to edit and review the work of other attorneys. Gordon also indicated

that the selectee had prior experience working on high profile cases and he had an excellent reputation within the office as well as among opposing counsel.

4. **Vacancy Announcement No. 04-083-DJ**

Spencer Barasch, selecting official, attested that he wanted a candidate who could be responsible for investigating potential federal securities law violations, summarizing findings and recommending potential action. Barasch indicated that he was looking for a candidate who was smart, possessed the relevant securities experience, and could effectively deal with several layers of bureaucracy. Barasch further attested that in his experience applicants who worked in larger firms and corporations performed better in the SEC office environment than applicants without that type of background. According to Barasch, Complainant came from a solo practice and a small firm background and was therefore, not a good fit for the unit. The selectees, however, all came from large Dallas area law firms and had securities-related investigatory experience. Further, Barasch stated that Complainant had not practiced law for some time and his most recent litigation experience involved legal areas unrelated to securities law. Barasch indicated that in his opinion, litigators such as Complainant, who were more independent, usually did not take well to the intense monitoring and supervision required for the position.

5. **Vacancy Announcement No. 04-088-MB**

Elizabeth King and David Shillman, the selecting officials, attested that they did not recall reviewing Complainant's resume. King and Shillman, however, asserted that they were looking for a candidate who had relevant experience specifically in the area of market oversight, or possessed other related securities experience. Shillman indicated that the two candidates selected had prior experience working in his SEC division, performed excellent work, and he

considered their professional skills and experience as best suited for the position.

6. Vacancy Announcement No. 04-128-MK

Levenson, who coordinated the hiring for this position and was a member of the interview panel, stated that he was looking for a candidate who had conducted numerous depositions, argued complex motions in court, had good writing skills, possessed considerable civil litigation experience, preferably in complex commercial fraud cases, and a solid pre-trial experience dealing with complex litigation. Levenson indicated that Complainant's qualifications did not compare to those of the selectees. Specifically, Complainant's writing sample did not reflect in-depth legal analysis and his prior trial experience did not involve the type of complex litigation the SEC is involved in. According to Gordon, selecting official and member of the interview panel, the panel concluded that Complainant's prior trial experience was not relevant to the SEC's case load. For instance, Complainant's prior trial experience involved plaintiff's litigation, construction law and personal injury related work. Finally, Martin, member of the interview panel, attested that he thought Complainant was not a strong candidate for the position because other selectees had more SEC related work experience and exhibited stronger writing skills.

7. Vacancy Announcement No. 04-060-DP (re-posted as 04-154)

Deborah Perkins, Human Resources Specialist, indicated that the position in question was only available to current SEC employees. Perkins indicated that Complainant did not make the certification list because at the time, Complainant was not an SEC employee.

8. Vacancy Announcement No. 03-256-TR

Barry Rashkover, selecting official, attested that he selected David Markowitz because of

his superior work as attorney and former branch chief at the SEC, including his work related to investigating and securing emergency relief in federal court to halt an on-going securities fraud scheme in 2002. Rashkover also stated that the selectee had a strong securities law background and previously litigated in a large New York law firm.

9. Vacancy Announcement No. 04-069-DC

Romajas, a member of the screening panel, attested that she did not recommend Complainant for an interview because she considered other applicants to be better qualified and indicated that the panel did not discuss Complainant because the panel chose to discuss only their top candidates. According to Romajas, seven candidates were selected, four accepted offers and three declined. Simpson and Romajas both indicated that the seven candidates selected possessed superior qualifications. Simpson and Romajas explained that the selectees were current SEC or Justice Department employees, or litigated in large law firms and had relevant trial experience. Simpson and Romajas further stated that, unlike the selectees, Complainant did not possess any government or current large law firm experience in a pertinent area, factors highly valued in the unit.

10. Vacancy Announcement No. 03-206-DC

Kornblau attested that in his opinion, Complainant was not as qualified for the position as the other applicants. Kornblau stated that Complainant was initially not considered for the position by the panel members because they did not deem him to be a strong candidate. Kornblau explained that one of the panel members referred Complainant's resume to him because he thought it was "unusual." IR, F-2 at 14. After the referral was made, Kornblau spoke to the panel members about the situation and was told by panel member Mejia, among other things, that

he had concerns about the fact that Complainant had not litigated or tried a case in many years and that he had some concerns about Complainant's personality. Kornblau stated that he discussed the issue with Bresnan and that they both decided to go ahead and interview Complainant.

According to Kornblau, based on the comments made by Complainant at the interview, he concluded that he would be unable to work well with other employees, including attorneys with less experience. Kornblau explained that Complainant raised concerns with respect to his possible arrogance in dealing with the junior investigative staff, which is a problem that Kornblau was trying to avoid. Kornblau also stated that he found Complainant to be arrogant "in terms of his own experience, background and abilities" and that he "displayed a sense of entitlement to the position." IR, F-2 at 16-23.

Bresnan attested that he found Complainant to be arrogant and "self-important." IR at 13-16. Bresnan also asserted that he found several factors that weighed negatively against Complainant, such as, lack of prior SEC trial experience; failure to demonstrate that he was able to effectively work with his peers; and the fact that he had not practiced law in several years.

11. Vacancy Announcement No. 03-208-DC

Marc Fagel, SFDO Branch Chief and member of the hiring committee, stated that he reviewed all the forwarded applications and determined that Jina Choi, a former SFDO employee, possessed superior qualifications and professional experience. Fagel further indicated that because he and the selecting official, Robert Mitchell, knew the selectee well, they decided not to interview her. According to the Agency, the SEC has no record that Complainant applied for the position.

12. Vacancy Announcement No. 03-251-DC

The PRO Associate Regional Directors did not interview Complainant for the position. Lee stated that Complainant was not interviewed because during his interview for another PRO position he "stated unequivocally that he was not interested" in the position in question and that "he did not wish to be considered for it." ROI, Tabs f-12 at 16-24, 27-30. According to Lee, because of Complainant's lack of interest in working in the Los Angeles office and in mentoring less experienced attorneys, he concluded that Complainant was not a good match for the Los Angeles office and for the position in question.

13. Vacancy Announcement No. 04-076-DP

Perkins, Human Resources Specialist, stated that Complainant was not included in the certificate of minimally qualified applicants because he did not possess the required international securities experience. Perkins further stated that Complainant's application stated that he had "little, but some actual experience in working international law." ROI, Tab F-21A; F-21D. Moreover, the selectee, Su Ping Lu, had extensive international law and securities experience.

14. The San Francisco District Office Position

Judith Anderson, Senior Special Counsel with the SFDO, stated that the SFDO did not advertise any SK-14 attorney positions during the time period in question. Anderson stated that the position advertised during the time period in question was an SK-13 attorney position that was advertised in the local newspaper and that the Legal Center copied it to its website. Anderson explained that there is a different hiring procedure for positions below the SK-14 level, and that it is less formal. Anderson also stated that the Agency does not have any records of Complainant's application for the position in question.

15. The Northeast Regional Office Position

Bennett Ellenbogen, member of the interview panel, stated that Complainant was considered to be qualified for the position and that his interview was generally positive. Ellenbogen also indicated that Complainant's qualifications were not as outstanding as those of the other candidates. Ellenbogen stated that he had some hesitation in recommending Complainant for the position, but not strong enough to have opposed extending an offer.

Leslie Kazon, member of the interview panel, attested that with respect to selecting Complainant she was "on the fence." ROI, F-30B. Kazon described Complainant as an experienced litigator, smart, effective and results oriented. Kazon, however, was concerned about Complainant's inexperience and lack of knowledge of securities law and "a certain California informality that might bode ill." Id.

16. Vacancy Announcement No. 04-027-DP

Deborah Perkins, the Specialist who handled the announcement, and Jeanine Lauth, Human Resources Director for Corporate Finance, explained that this posting was canceled on February 18, 2004, prior to the February 25, 2004 closing date, because the posting's wording was too vague. According to Perkins and Lauth, the selecting official had no knowledge of who the applicants were because the applications had not yet been referred to the selecting official at the time of the cancellation.

PRETEXT

I find that Complainant was unable to establish that the Agency's proffered reasons for the nonselections were a pretext for unlawful discrimination. In a nonselection case, pretext may be demonstrated where the Complainant's qualifications are shown to be plainly superior to those

of the selectee(s). *See Bauer v. Bailar*, 647 F.2d 1037, 1048 (10th Cir. 1981). To do so, Complainant would have to show that his education and work experience were so plainly superior to those of the selected candidates "as to virtually jump off the page and slap us in the face." *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993). *See Dobson v. Dep't of Interior*, EEOC No. 01933095 (June 30, 1994). Complainant, however, has failed to proffer evidence to show that his qualifications were clearly superior to those of the selected candidates. In fact, the record shows that Complainant lacked the securities related experience necessary to perform in most of the positions in question. In addition, the record shows that Complainant was not recently involved in litigation or tried cases several years prior to his application for employment with the SEC. Furthermore, unless a candidate can show that he has observably superior qualifications, "[e]mployers generally have broad discretion to set policies and carry out personnel decisions and should not be second guessed be a reviewing authority absent evidence of unlawful motivation." *Holley v. Dep't of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997).

Complainant avers with respect to the 03-206-DC Trial Attorney position, that comments made by the selecting official, Kornblau, constitute evidence of age based discrimination. Complainant alleges that at the interview for the position Kornblau stated to him "[y]ou really took a different way of getting here." IR, F-1. Kornblau attested that he did not recall making the comment. The second comment allegedly made by Kornblau was where he asked Complainant why he did not apply to the General Counsel's or Chief Counsel's Office. Complainant argues that this comment shows that Kornblau was looking for someone younger or less experienced than Complainant for the position. Lastly, the third comment allegedly made by

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Kornblau was after Complainant was hired by the Agency. According to Complainant, Kornblau stated to a fellow staff member that another person appeared to look younger than his/her twenty-two years of experience. Complainant avers that the comment is indicative of Kornblau's sensitivity to age. I find that the three comments are not indicative of age discrimination. In fact, the third comment was made after Complainant was hired by the Agency and is totally unrelated to the hiring for the position. Even assuming these comments were indicative of age discrimination, they are at most isolated or stray comments and are not legally sufficient to show pretext. *See Woythal v. Tex-Tenn Corp.*, 112 F.3d 243 (6th Cir. 1997) (It is insufficient to support an inference of age discrimination with just personal belief, conjecture and mere speculation.).

DECISION

For the reasons set forth above, I find that Summary Judgment is appropriate and that Complainant failed to produce evidence that could prove that the Agency discriminated against him.

Frances del Toro
Administrative Judge

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NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. 1614.403, and append a copy of your appeal to your final order. See EEOC Management Directive 110, November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. § 1614.505.

TO THE COMPLAINANT:

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. § 1614.110(a). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. *See* EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.

WHERE TO FILE AN APPEAL:

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

BY MAIL:

Director, Office of Federal Operations

Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

BY PERSONAL DELIVERY:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, NW
Washington, D.C. 20507

BY FACSIMILE:

Number: (202) 663-7022

Facsimile transmissions of more than ten (10) pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. § 1614.504, an agency's final action that has not been the subject of an appeal to the Commission or a civil action is binding on the agency. If the complainant believes that the agency has failed to comply with the terms of this decision, the complainant shall notify the agency's EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The agency shall resolve the matter and respond to the complainant in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the agency has complied with the terms of its final action. The complainant may file such an appeal 35 days after serving the agency with the allegations of non-compliance, but must file an appeal within 30 days of receiving the agency's determination. A copy of the appeal must be served on the agency, and the agency may submit a response to the Commission within 30 days of receiving the notice of appeal.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
1801 L Street, N.W., Suite 100
Washington, D.C. 20507

Gary Aguirre,	
Complainant,	EEOC No. 100-2005-00413X
v.	Agency No. 155120631-48
William H. Donaldson, Chairman, U.S. Securities and Exchange Commission,	Date: June 14, 2006
Agency.	

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision dated June 14, 2006, judgment in the above-captioned matter is hereby entered. A Notice To The Parties explaining their appeal rights is attached.

This office is also enclosing a copy of the hearing record for the Agency and a copy of the transcript for complainant and/or his/her representative.

This office will hold the report of investigation and the complaint file for sixty days, during which time the Agency may arrange for their retrieval. If we do not hear from the Agency within sixty days, we will destroy our copy of these materials.

It is so ORDERED.

For the Commission:

Frances del Toro
Administrative Judge

Enclosures

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing documents within five (5) calendar days after the date they were sent *via* first class mail. I certify that on June 14, 2006, the foregoing documents were sent *via* first class mail to the following:

Garry T. Aguirre
1528 Corcoran St., N.W.
Washington, D.C. 20009

Juanita C. Hernandez
Office of General Counsel
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612

Deborah Balducchi, Director
EEO Office
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0212

Frances del Toro
Administrative Judge

SEC DIVISION OF ENFORCEMENT
Case Closing R port

Run on 11/30/2006

Case No.: HO-09818 **Case Name:** ELITE INFORMATION GROUP, INC.

The undersigned has been designat d by the Director of the Division of Enforcement to exercise delegated authority to terminate and close all investigations authorized by the Commission pursuant to Section 20 of the Securities Act of 1933 [15 U.S.C. 77t], Section 21 of the Securities Exchange Act of 1934 [15 U.S.C. 78u], Section 18 of the Public Utility Holding Company Act of 1935 [15 U.S.C. 79r], Section 42 of the Investment Company Act of 1940 [15 U.S.C. 80a-41], and section 209 of the Investment Advisers Act of 1940 [15 U.S.C. 80b-9].

I hereby clos this case, pursuant to delegated authority.

Peter N. Bram
Signature

Deputy Director
Title

11/30/06
Date

SEC DIVISION OF ENFORCEMENT
Case Closing Recommendation

Run on 11/30/2006

Case No.: HO-09818 **Case Name:** ELITE INFORMATION GROUP, IN

Case Closing Recommendation Narrative:

PEQUOT CLOSING MEMORANDUM HO-9818

This investigation involved a number of potential federal securities law violations by hedge fund adviser Pequot Capital Management ("Pequot"). In January 2005, the staff obtained a formal order of investigation from the Commission, authorizing the staff to issue subpoenas for documents and witness testimony. Thereafter, the staff issued more than 100 subpoenas requesting documents and took the testimony of 19 individuals (1). The staff also made numerous informal document requests, interviewed six individuals, and participated in two proffer sessions with the Federal Bureau of Investigation and the office of the U.S. Attorney for the Southern District of New York ("Southern District"). The potential violations investigated break down into three major categories: 1) potential insider trading by Pequot in a number of securities, including General Electric ("GE"), Heller Financial ("Heller"), Microsoft Corporation ("Microsoft"), AstraZeneca PLS ("Astra") and Par Pharmaceuticals ("Par"); 2) potential insider trading ahead of PIPE offerings; and 3) potential market manipulation. Each is addressed below.

1) Insider Trading

A.□ Trading ahead of the GE acquisition of Heller

Background: On July 30, 2001, it was publicly announced that GE had acquired Heller, causing a sharp rise in the stock price of Heller and a small decline in the stock price of GE. Pequot began accumulating Heller common stock on Monday July 2, 2001 (2) and started selling short GE stock on July 25, 2001. By closing out these positions after the merger announcement, Pequot realized a profit of nearly $17 million on Heller and approximately $1.9 million on GE (3).

In May 2005, Arthur Samberg, the head of Pequot and the individual responsible for making the trading decisions in both Heller and GE stock, initially testified to the staff that he did not remember why he decided to make the trades, but in subsequent testimony he referred to publicly available information about Heller at the time he made the trades as the basis for placing the Heller trades. However, Samberg acknowledged he was unsure whether he had actually seen this information before he made the trades.

Investigatory Steps: During the summer of 2005, the investigation focused on whether John Mack, who had a personal relationship with Samberg, as well as a number of business relationships with Pequot (4), provided Samberg with inside information about the merger ahead of the public announcement. Emails indicate that Mack and Samberg often communicated during this time and suggest that Mack spoke by telephone with Samberg about a potential investment the night of Friday, June 29, 2001, the business day before Pequot began purchasing Heller, but that the conversation related to an unrelated non-public company. Credit Suisse First Boston ("CSFB"), an investment banking firm and an adviser to Heller in the transaction, hired Mack as its CEO on July 12, 2001, ten days after Pequot began to buy Heller stock. However, counsel for CSFB advised the staff that the CFO of CSFB who met with Mack before Mack joined CSFB did not have deal information on specific pending deals on which CSFB was working. In addition, until March 2001, Mack had been the CEO of Morgan Stanley Inc., which advised GE on the transaction, but records the staff obtained show that Morgan Stanley's first contact with GE regarding a potential transaction with Heller occurred in April 2001, after Mack had already left the firm.

By November 2005, having taken the testimony of Samberg twice, interviewed Samberg's former partner, and obtained email, chronologies, documents, and information regarding Mack from several sources, including CSFB, Morgan Stanley, and Pequot, the staff had found no evidence that Mack had any information about the merger before he joined CSFB on July 12.

Starting in September 2005, the staff focused on identifying other potential tippers who could have provided Samberg information about the GE/Heller transaction. The staff reviewed Samberg's calendar to identify who he met with at the time of Pequot's trading. The staff also obtained from Pequot a list of people hired in 2001 and identified several people on that list who had connections with GE, Heller, or broker dealers involved in the merger. The staff also reviewed the emails obtained from Pequot to identify other potential tippers. The staff then compiled information about each person identified, including searching for relevant documents in the database of emails provided by Pequot.

When this research was complete, the staff evaluated whether to take the testimony of any of these potential tippers. The staff determined that while it had identified people with significant connections to Pequot or Samberg or both, there was no evidence that any knew about the merger in advance of its public announcement. Conversely, those who knew about the deal did not have sufficient connection to Pequot and/or contact with Samberg or Pequot during the relevant time period. Thus, the staff had identified a large number of potential tippers, but no likely tippers. Without any evidence suggesting that any of these people were the tipper, the staff decided taking any of their testimony would not be fruitful. At this same time, around December 2005, the focus of the insider trading case shifted to Microsoft, where it remained until June 2006.

Beginning in June 2006, the staff considered whether to take any additional investigatory steps regarding the GE/Heller trading. Ultimately, the staff took the testimony of six witnesses, and received documents requested by subpoena from each. On July 27, 2006, the staff took the testimony of two CSFB employees, a former CFO and a company lawyer, who were both involved in recruiting Mack. Both denied knowing about the merger before it was publicly announced, let alone telling Mack anything about it, and the documentary evidence did not contradict their denials. On August 1, 2006, the staff took the testimony of Mack. Mack denied knowing about the merger before he became CSFB's CEO in mid-July 2001 and denied having any discussions with Samberg or anyone else at Pequot about the merger before it was announced. He further denied having discussions with anyone at Morgan Stanley in 2001 about GE, Heller, or the GE merger with Heller. On August 17, 2006, the staff took the testimony of the head trader at Pequot who executed the trades in both Heller and GE at Samberg's direction. The head trader testified that he did not recall anything about the trades but that the size of the investment in Heller was not unusual. On September 7, 2006, the staff took the testimony of the head trader's assistant at Pequot at the time of the transactions. The assistant testified that his role at Pequot was largely administrative at that time, and he could not remember any involvement in the GE/Heller trading. On September 8, 2006, the staff took the testimony of an analyst at a brokerage firm who provided analyst coverage on Heller during the relevant time period, appeared to have met with Pequot in June 2001 shortly before Samberg started buying Heller, and went to work at Pequot in early 2002. The analyst denied having any inside information about the merger transaction before it was announced and we have found no evidence to the contrary.

SEC DIVISION OF ENFORCEMENT
Case Closing Recommendation

Moreover, although he was scheduled to meet with Pequot in June 2001, it appears from the analyst's personal calendar and testimony that the meeting was cancelled.

Conclusion: The staff has been unable to find any evidence that Pequot had information regarding the merger between GE and Heller before the merger was publicly announced, much less that anyone tipped Pequot or Samberg about the merger in advance of its announcement. The staff's investigation found that it is extremely unlikely that Mack tipped Samberg about the merger between GE and Heller, having found no evidence that Mack knew about the merger before Samberg started purchasing Heller stock. Moreover, emails Samberg sent evidence that Samberg did not even know about Mack joining CSFB until after it was publicly announced (5). It is unlikely that Mack told Samberg about confidential information about the merger if he learned it in connection with being recruited by CSFB, without revealing his impending employment.

There is additional evidence that casts doubt on the possibility that Pequot traded on the basis of non-public information in regard to its trading in GE and Heller. Although Pequot made a substantial profit purchasing Heller ahead of the announced merger, the size of its position in Heller was not atypical for Pequot (6) and Pequot purchased other financial stocks around the same time as the Heller purchases, clearly following the financial sector, not just Heller (7). Moreover, according to its trading records, during 2001 Pequot shorted GE stock on several different occasions (8).

B.□Trading in Microsoft

Background: In April 2001, David Zilkha, a Microsoft employee, went to work as an analyst at Pequot. Even before he officially started work at Pequot, Zilkha started providing Samberg with information about Microsoft by email, including information attributed to Microsoft employees (9). Around the same time, Samberg started buying Microsoft options, which increased in price throughout this period. In emails from this time, Samberg repeatedly gave Zilkha credit for profits Pequot made in trading Microsoft, but did not identify the specific profits or trades.

Investigatory Steps: Beginning in June 2005, and continuing thereafter, the staff provided the Southern District with information about Pequot's trading in Microsoft. In the fall of 2005, the FBI located Zilkha and interviewed him twice. On December 14, 2005 the staff participated in a proffer session with the Southern District with Zilkha. Zilkha proffered that he had obtained information from Microsoft employees and provided it to Samberg, but did not believe the information was either material or confidential.

On January 23, 2006, the staff took Samberg's testimony regarding the Microsoft trading. Samberg testified that he could not remember why he placed the trades, downplayed Zilkha's role in his trading, and denied receiving any material non-public information concerning Microsoft. On February 10, 2006, the staff conducted a second joint proffer with the Southern District with Zilkha. Zilkha proffered the names of the Microsoft employees he believed provided him with information in April 2001. Also during this time, the staff reviewed the results of subpoenas issued to Zilkha and Microsoft.

By March 2006, the staff had focused on two pieces of information Zilkha provided to Samberg by email. The first email, dated April 17, 2001, stated that a Microsoft employee had told Zilkha, a few days before a Microsoft earnings announcement, both that the controller for one of Microsoft's divisions was more "relaxed" about earnings than in previous quarters and that this information suggested the earnings news would be positive. Two days later, on April 19, Samberg purchased Microsoft call options and sold short Microsoft put options. Later that day and after the market close, Microsoft announced that its earnings had significantly exceeded analysts' expectations. The following day, April 20, Pequot sold its call options and closed out its short position in the put options, realizing a profit of approximately $1.6 million. The second email, dated April 27, 2001, stated that a Microsoft employee had told Zilkha that a rumor regarding a delay in the release of a Microsoft product was untrue. The next trading day, April 30, Samberg purchased call options in Microsoft. Two days later, May 2, Microsoft stock rose and Pequot sold the purchased options, realizing a profit of approximately $530,000.

The staff interviewed by telephone the person Zilkha identified as the source of the first tip, but she denied even knowing Zilkha, and told the staff she would never have told anyone that type of information. The FBI was unable to locate the alleged source of the second tip, who had left Microsoft and was believed to be living in Brazil. The staff interviewed two other Microsoft employees identified by Zilkha as his sources for other information he provided to Samberg around the time Pequot traded in Microsoft, and both categorically denied providing him with any information. At the end of March, the staff obtained four month tolling agreements from Pequot, Samberg and Zilkha.
The tolling agreement applied to all matters under investigation, including the Microsoft transactions.

In April 2006 the staff learned more about the product delay that was the subject of the second tip. First, the staff learned that other events, not related to the product delay rumor, caused a sharp increase in Microsoft's share price a few days after Zilkha provided the information to Samberg. Moreover, the staff learned that information relevant to both the earnings announcement and the product delay had been provided to Pequot by Goldman Sachs ("Goldman") in advance of Goldman publishing the information and before Pequot's trades. To examine whether Goldman's actions were themselves improper, the staff obtained information from Goldman and in early June took the testimony of two Goldman employees. Both told the staff that during this time they regularly provided research information to Goldman customers in advance of publishing this information, and that Goldman policy explicitly allowed this practice.

Conclusion: While the emails from Samberg praising Zilkha for his work on Microsoft suggest that Samberg may have used information from Zilkha to trade in Microsoft options, there is insufficient evidence to bring a case based on this conduct. The staff could only identify two tips that were related to profitable trading by Pequot in Microsoft. The first, the information about a controller being relaxed is vague, and the alleged source denies providing the information to Zilkha. Moreover, the information Pequot received from Goldman around the same time as Zilkha's tip about the same earnings announcement gives Samberg a justification for his trading. The second, the information about the product delay, did not drive the rise in Microsoft's stock price. Finally, the staff determined there was nothing illegal about Goldman giving its clients, including Pequot, information it developed internally, before that information was publicly disseminated.

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□C.ATrading In AstraZeneca and Par Pharmaceutical

Background: The staff also investigated Pequot's trading in AstraZeneca ("Astra") and Par Pharmaceutical ("Par"). On October 11, 2002, a federal district court issued an opinion upholding patents of Astra and declaring that Par infringed upon those patents. The court decision caused the shares of Astra to increase in price by 12% and the shares of Par to decrease in price by 21%. The staff's initial inquiry into the trading indicated that shortly before the court announced its decision, Pequot reversed its trading pattern in both stocks.

Investigatory Steps: The staff learned that the Southern District had conducted an investigation regarding whether a judicial law clerk had leaked the outcome of the patent case. That investigation had ended because the Southern District was unable to identify anyone who profited from the tip or whether there even was a tip. The staff reviewed the formal written statements prepared by the FBI from that investigation and reviewed Pequot emails but was unable to find any links between Pequot and the people interviewed in that investigation.

In November 2005, the staff examined Pequot's trading records and determined that the staff's initial inquiry presented an incomplete and misleading picture of Pequot's trading in the stocks of Astra and Par. Although from August 23, 2002 through September 25, 2002, Pequot did reverse a significant portion (approximately $18 million) of a short position it had established in Astra, Pequot was adding to its position in Par during part of the same time period (September 6 through September 11), purchasing approximately 200,000 shares of Par common for approximately $4.8 million. Pequot did not begin to reverse its long position in Par until September 27, 2002, after it had stopped reversing its Astra short position. Moreover, on October 11, 2002, the date the court decision was made public, Pequot still held a long position in Par (close to $2 million) and a significant short position in Astra (more than $6 million) (10). Both of these positions proved to be losing positions and it would have made no economic sense to maintain either of them if Pequot had inside information regarding the upcoming decision in the patent case. Finally, during 2002, from February on, Pequot traded in and out of Par and Astra.

Conclusion: It seems unlikely that Pequot had inside information about the court decision because it made investment decisions contrary to that information in the weeks leading up to the decision. Accordingly, we stopped pursuing this aspect of the investigation.

2)□Private Investments in Public Equities ("PIPES")

Background: This aspect of the investigation concerned potential insider trading by Pequot in the common stock of companies issuing PIPES ahead of the public announcement of the PIPES. The public announcement of a PIPE often causes the price of issuer's stock price to fall, making it advantageous to sell short the stock of companies who issue PIPE securities before the transactions are publicly announced. Such trading may violate the law against insider trading. The Pequot PIPE investigation was initially opened by the SEC's Northeast Regional Office ("NERO") but during the fall of 2005 transferred to the Washington office for efficiency purposes.

Investigatory Steps: Initially, the staff evaluated and reviewed Pequot's response to a subpoena issued by NERO with respect to Pequot's PIPE transactions. The staff then examined Pequot's trading activity in 101 PIPE transactions over a four year period beginning in 2001. The staff specifically examined Pequot's trading data to determine whether Pequot sold short prior to the public announcement of any PIPE it purchased. Of the 101 PIPES purchased by Pequot, the staff found that Pequot shorted ahead of the public announcements of 11, but the stock prices for 8 of the 11 did not decline materially after the announcements of the PIPE. For the three remaining issuers, Pequot sold short the issuer ahead of the public announcement but in all three cases its short selling activity occurred more than seven weeks before the PIPE was publicly announced. This would make it difficult to show that the short selling was based on material nonpublic information concerning the PIPE offering, the trading having occurred so far in advance of the public announcement of the offering (11).

Conclusion: Because the staff was unable to find instances where Pequot short sold shares within seven weeks, ahead of a public announcement of a PIPE offering in which they participated in and in which there was a material decline in the share price of the issuer, the staff stopped pursuing this aspect of the investigation.

3)□Market Manipulation

Background: During the fall of 2005 the staff began to closely evaluate two separate but similar trading practices engaged in by Pequot. The first involved Pequot's selling shares it received in numerous initial public offerings ("IPOs") and simultaneously purchasing the same number of shares soon after the shares began trading in the open market. This trading suggested that Pequot may have engaged in a manipulative trading practice because it appeared as if the trades did not involve a change in beneficial ownership (wash sales)(12). The second involved Pequot executing an agency cross trade, one side of which was a short sale and the other side was a purchase of the same security. The short sale and the buy were for the same number of shares and price and were executed simultaneously. The trade was reported as an agency cross; however, the Pequot trade blotter shows that the same Pequot funds executed both the sales and the purchases, causing no change in beneficial ownership. Again this trading was suggestive of manipulative trading.

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Investigatory Steps: The staff requested a written explanation from Pequot regarding their apparent wash sale trading and sent a follow-up subpoena to Pequot for additional information on the trading practices after receiving Pequot's explanation. Pequot provided an extensive written response explaining that its trading occurred to transfer beneficial ownership of the stocks acquired in IPOs from one class of fund investors (those eligible to participate in the offering) to another class of investors (those ineligible to participate), and was specifically sanctioned under an NASD interpretation. This explanation was consistent with Samberg's testimony concerning this practice. The staff then reviewed Pequot's supporting documentation and certifications concerning Pequot's compliance with the NASD rule and found that the documentation was consistent with Pequot's assertion that it was transferring beneficial ownership of the securities from one class of investors to another.

The staff met several times with staff from the Division of Market Regulation ("Market Regulation") concerning whether Pequot's agency cross trades violated the federal securities laws. Market Regulation recommended that the staff first evaluate the market impact from Pequot's cross trading (13). The staff then analyzed the market impact from Pequot's cross trading activity in 92 securities -- 5 New York Stock Exchange issuers; 7 American Stock Exchange issuers; 22 Nasdaq National Market System issuers; 29 Nasdaq Small Cap issuers; and 29 Over the Counter Bulletin Board issuers -- and found that there was no significant impact on both the market price and volume for any of the stocks by the cross trading activity, making it difficult to prove market manipulation by Pequot.

Conclusion: For the reasons discussed above, the staff did not pursue further the market manipulation aspects of the investigation.

There are presently outstanding FOIA requests for this matter, in addition there was a denial of a request on November 1, 2006.
All files related to the case have been retained.

Termination letters are appropriate in this case and will be sent to Pequot Capital Management, Arthur Samberg, and John Mack.

The Branch Chief, Robert B. Hanson and the Assistant Director, Mark Kreitman, have reviewed and approved this form.

Footnotes:

(1) Pequot alone made available approximately 19.8 million pages of electronic email and produced 161,500 pages of hard copy documents. The staff also issued numerous document subpoenas to broker dealers, issuers, individuals, and service providers. The hard copy documents collected in the investigation fill approximately 95 banker boxes.
(2) Pequot's brokerage firm used the name "Indian Capital Management" in its internal system to refer to these trades. Pequot employees were not aware that this was done, and neither Pequot nor the brokerage firm where the trades were placed was able to provide any explanation as to why the trades were not placed using the Pequot name. The staff did not discover any reason for the use of this name, nor, since the name was used internally by the brokerage firm, any advantage Pequot derived from its use.
(3) Pequot closed out its GE short position approximately two weeks after the merger announcement. Had it closed out the position the day after the merger announcement, its profit on the GE trades would have been approximately $900,000.
(4) Mack, his wife, and a foundation Mack controlled made significant investments in a number of Pequot funds. Mack also participated with Pequot in at least two private company investments in 2001.
(5) Similarly, email traffic between Samberg and his wife evidences that Samberg did not know that Mack was going to resign from Morgan Stanley until after the resignation was publicly announced in January 2001. Approximately two months after the public announcement, Mack officially left Morgan Stanley.
(6) Pequot has publicly stated that during the period of the staff's review, it conducted over 136,000 trades. Moreover, the size of the position Pequot accumulated in Heller was equal to approximately one and a half percent of the total assets Samberg traded in 2001. Pequot records reflect that in 2001 Pequot took positions in numerous companies in percentages approximately equal to or greater than that amount.
(7) For example, on July 2, 2001, Pequot purchased 220,900 shares of stock in American Express Inc. On July 11, 2001, Pequot had trading positions in at least twelve different financial stocks.
(8) For example, from September 26 through October 5, 2001, Pequot established a short position in GE of approximately $30 million.
(9) Zilkha used the name of only one of these individuals in emails, the remaining individuals were only identified by their generic position at Microsoft.
(10) The staff initially believed that Pequot failed to list its holding of 213,000 Astra shares on its Form 13F filed for the period ended September 30, 2002. However, Pequot trading records show that Pequot purchased Astra shares to cover existing short positions, but did not in fact own any Astra shares as of September 30, 2002.
(11) Because the staff did not find any instances in which Pequot traded on material nonpublic information ahead of the PIPE offerings, it did not evaluate whether Pequot breached a duty of trust or confidence with respect to its trading ahead of the offerings.
(12) Section 9(a)(1) of the Exchange Act prohibits certain manipulative practices, including wash sales and matched orders, when such transactions are done for the purpose of creating the false or misleading appearance of active trading in a security listed on a national securities exchange, or a false or misleading appearance with respect to the market for any such security. Section 9(a)(2) prohibits the manipulation of prices of securities listed for trading on a national exchange, and makes it unlawful for a person to engage in a series of transactions that creates actual or apparent activity or depresses the stock's price when done for the purpose of inducing others to buy or sell the security. Manipulative practices under Section 9(a) also violate Section 10(b) and Rule 10b-5 of the Exchange Act for both exchange-listed securities and over-the-counter securities. To establish a violation of Sections 9(a)(1) and 9(a)(2) specific manipulative intent must be proven.
(13) The Supreme Court has stated that manipulation "connotes intentional or willful conduct designed to defraud investors by controlling or artificially affecting the price of securities." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976) (emphasis added).

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Representations

A. FOIA

After consultation with FOIA/PA Branch, it was determined that the FOIA status of these case files is as follows (Check one):

- ☐ No FOIA concerns exist as of _____.
- ☐ FOIA request filed on _____ is pending without decision. Category F Material will be retired with balance of file.
- ☒ FOIA request was denied on 11/1/06. Category F Material will be marked to be discarded six years after decision date.
- ☐ FOIA determination was appealed and decided on _____. Category F Material will be marked to be discarded six years after decision date.

B. Category E Records

- ☐ The files contain no Category E Records.
- ☑ A copy of the index for all designated Category E (Miscellaneous) Records is attached. All records of this case have been maintained by the General Counsel's office and the Division of Enforcement.

C. Termination Letters

- ☐ No termination letters are required.
- ☒ Termination letters will be sent to the parties listed in the case narrative.

D.

- The files relating to this case have been prepared for disposition in accordance with procedure in the memorandum, *Disposition of Records Upon the Closing of Cases* (August 20, 1993).
- Except as set forth, no access requests or protective orders are outstanding: _____
- No objection is made to eventual destruction of the files. [Consult with the Office of Chief Counsel concerning designation of any case files for Archival retention].

Based on the representations made above, the undersigned recommend(s) the closing of this case.

Signatures:

Attorney	Date 11/30/06
Branch Chief	Date 11/30/06
Asst Dir/Asst Reg Adm/ Asst Dist Adm	Date

Attach a copy of the Case Summary Report and submit this form to the Office of Chief Counsel.

SEC DIVISION OF ENFORCEMENT
Investigation Summary

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Inv. N :	HO-09818-A		**Inv. Name:**	TRADING IN CERTAIN SECUF
Branch Chief:	HANSON, ROBERT B	202-551-4497		40423
Primary Staff:	EICHNER, JAMES A	202-551-4928		40421
Status:	Closed		**Open Date:**	01/14/2004
Last Event:	11/30/2006	MUI/Investigation Status Change		
Formal Order Date:	01/06/2005		**Close Date:**	11/30/2006

Possible Violations:

34 §10B	Fraud
34 §14E	Tender Offer Fraud
34 R10B-05	Fraud
34 R14E-03	Tender Offer Insider Trading

Origins:
REFRD FROM SRO-NOT V

Keywords:
FRAUD IN OFFER/SALE/PURCHASE

Trading Markets:
NASDAQ

Types of Security:
COMMON STOCK

MUI:	**MUI Case No.:**	MHO-09818	**MUI Case Name:** ELITE INFORMATION GROUP, INC.
	MUI Status:	Closed/Investigation Opened	**MUI Open Date:** 11/14/2003
			MUI Close Date: 01/14/2004

Testimony of
John P. Wood
CEO & Chairman of the Board
Telos Corporation

Unite States Senate Committee on the Judiciary
"Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity"

Tuesday, December 5, 2006

Mr. Chairman, Ranking Member Leahy, and Members of the Committee on the Judiciary:

I want to thank the Judiciary Committee and Chairman Specter for inviting me to submit testimony for this important hearing, "Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity." My name is John B. Wood, and I'm the Chief Executive Officer and Chairman of the Board of Telos Corporation, a government security solutions provider headquartered in Ashburn, Virginia.

To begin, let me say that hedge funds serve an important function in the national and global economy. In various capital markets, they act as a stabilizing force as providers of liquidity and absorbers of risk. They provide a rewarding channel of investment for those able to afford the risk of backing ventures such as those typically offered by hedge funds. Risk and speculation lie at the heart of the American free enterprise system, and I firmly believe that those who undertake such risk should be rewarded in kind. Even today's so-called "activist" hedge funds, when operated with integrity, can be helpful in ensuring effective management and proper corporate governance.

Yet, as recent reports have demonstrated, there is an increasing need for the effective enforcement of prohibitions against insider trading and other potential abuses of private, unregulated equity markets. The Committee and its staff are to be commended for their efforts to produce draft legislation that attempts to ensure enforcement of the laws against unlawful insider trading and safeguarding the interests of individual and institutional investors. The staff draft certainly reflects the goal of ensuring the integrity of the securities markets and investors, and highlights the need for hedge funds to create and enforce effective compliance programs.

Before I offer my comments on any particular provision of the staff draft, I think it would be helpful to share some history concerning my own company's dealings with rogue hedge funds. As background, before coming to Telos, I was a Wall Street investor. So I not only understand the world of speculative investment, I fully support and defend it. But like the "corporate raiders" of the 1980s, today's so-called "activist" hedge funds are threatening to disrupt an efficient marketplace in which properly managed enterprises conduct business.

A recent article in *Financial Times* quotes Michael Klein, head of global banking at Citigroup, as saying that "some activists are actually mimicking the ways of the old corporate raiders, forcing short-term return of capital without creating long-term value." Hedge funds themselves are becoming aware of the problem. One fund president said in a business article last September, "I don't have a problem with managers being disagreeable if they know what they're doing, but just writing a letter for the purpose of scaring a company into selling itself doesn't add value. For activists to be relevant to a company and its management, they have to be competent and sensitive to stakeholders including customers, employees and vendors."

The disastrous potential of such short-term thinking is suggested by a report that was released a few months ago. Last fall two professors with NYU's Stern School of Business published a study examining a large sample of hedge fund activism between January 1, 2003 and December 31, 2005. They found that hedge funds have been successful in getting management of publicly held companies to acquiesce in their demands more than 60 percent of the time. Those demands have included obtaining representation on the firm's board, a change in strategic operations, or compelling the sale of the company to another firm -- sometimes the hedge fund itself.

Such results aren't inherently bad, as long as the hedge funds involved are acting with legitimate motives such as increasing shareholder value or spurring under-performing companies to improve their operations. But other significant findings from this study reveal potentially darker motives of some funds. The study shows that activist hedge funds:

- Do not target weak or poorly managed firms, they go after profitable and healthy firms, firms with above-average cash holdings.

- Earn significantly higher stock returns around the initial 13D filing date -- as if anticipating a short-term boost in value through the saber-rattling that typifies the hedge fund 13D.

- Do not improve the accounting performances of firms in the year after the initial purchase – in fact, both earnings per share (EPS) and return on assets (ROA) decline in the fiscal year after the activism.

- Appear to extract cash from the firm through increasing the debt capacity of the target firm and paying themselves higher dividends.

- Achieve their goals by posing a credible threat of a costly proxy fight.

My company, Telos Corporation, has experienced first-hand the predatory strategies used by such hedge funds. Beginning in January 2005 a partnership of investors began buying non-voting preferred stock in Telos, and within a few weeks owned 13.7 percent of the preferred shares. The investors consisted of three hedge funds acting on behalf of other investors whose identities have largely remained unknown to Telos management.

As I stated earlier, I do not oppose hedge funds as an investment vehicle, nor do we oppose what have been characterized as "activist hedge funds." Telos welcomes the involvement of any beneficial investor who sincerely desires and actively works for the well-being of the company, its shareholders, employees, and customers.

However, the actions of these particular hedge fund investors suggest, motivations inconsistent with the best interests of the company. Indeed, SEC and lawsuit filings fail to demonstrate any clear intention on the part of these investors to be engaged in a process that augments the value of the company, improves corporate governance, or enhances efficiencies or financial performance of the company. Instead, these sorts of investors seem willing to engage in actions for short term financial gain, such as litigation and proxy battles, that subject companies to staggering costs, lost productivity and potentially ruinous consequences for the long term viability of the company.

In our case, these tactics sap the company's resources and distract it from its mission of delivering IT solutions that empower and protect federal agencies, the armed forces, homeland security, and the intelligence community. Telos Corporation has spent millions of dollars defending against what it believes to be baseless lawsuits relentlessly pursued to leverage short term gain. Nor is Telos the only target of these investors; our research has identified numerous companies similarly targeted in recent years by this same cabal.

Ironically, these investors have alleged that Telos management is inimical to shareholder value -- yet the value of Telos' public preferred stock (the very class of stock they own) validates the successful performance of the company. The public preferred shares have grown in value from approximately 25 cents per share in 1989 to a current trading value of approximately $19.00 per share. Indeed, the value of this stock has more than tripled since the time these investors bought their initial shares in January 2005, when the stock was trading at approximately $5.50 per share.

From the standpoint of corporate governance and integrity, we at Telos do not even know the identities of the investors on whose behalf these activist hedge funds purport to operate. Their filings and briefs read like the accusations of a star chamber -- and like the defendant in a star-chamber proceeding, we do not really know who our accusers are.

The Committee is faced with a difficult public policy challenge: how to ensure effective enforcement of existing law and protect the integrity of the securities markets and investors without imposing burdensome regulations? The staff draft attempts to achieve this balance by providing incentives for private citizens to report unlawful activity; tweaking the criminal laws on insider trading; encouraging greater coordination of civil and criminal enforcement agencies; and by establishing a self-policing and compliance obligation on hedge funds.

In general, I believe the staff draft strikes a good balance. In particular, Section 6 and its proposed compliance and bookkeeping provisions are a novel and useful proposal.

Section 6 proposes a self-policing mechanism that requires each hedge fund to establish and implement a written code of ethics and compliance program that, among other things, will reasonably safeguard and prevent the misuse of material non-public information. I would recommend that Section 6 be amended to include a quasi-public disclosure component. Specifically, that hedge funds should be required to make available to any entity with which that fund has material holdings the following information: the total assets of the fund; the total derivatives position of the fund; the balance sheet leverage ratio of assets to liabilities for the end of the reporting quarter; and the identity of significant investors in the fund. This critical information will help those with whom hedge funds are doing business know who it is they are doing business with.

I believe we are seeing an increasing number of small companies that are falling into the clutches of litigation-driven hedge funds. As I have stated earlier, these do not have to be poorly managed, under-performing companies. As the pressure to maintain high returns grows, the pressure to return a quick profit at the expense of long-term interests also increases. Companies built on the "sweat equity" of employees, intellectual capital, and long-term investment in future opportunities will be targeted for looting by parasitic firms that cannot survive on their own productive ability.

In closing, Telos has stood up to the tactics of the excessively activist hedge funds. Yet, it has not been easy and it has been a costly proposition for us. There are many other companies that, faced with a similar choice and limited resources, have been forced to settle. But at what cost to the employees and the long term prospects for these companies? In the end, it is my hope as a manager and corporate steward that this Committee will take action to better arm businesses like mine with basic information about the hedge funds that are an increasingly active part of our financial marketplace. Giving the public the reforms outlined in the staff draft should better protect legitimate businesses, their employees and shareholders, and the communities in which they operate.

Thank you.